

No. 89-767

Supreme Court, U.S.

FILED

DEC 13 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT ALTON HARRIS,

Petitioner,

v.

R. PULLEY, WARDEN, CALIFORNIA STATE PRISON
AT SAN QUENTIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Constitution prohibit the prosecution in a capital trial from rebutting defendant's false claims of remorse with expert testimony showing defendant is an "anti-social personality," also referred to as a "psychopath" or "sociopath?"

2. Whether the federal district court, under the facts of this case, abused its discretion in refusing to grant petitioner's motion for discovery of data for use in a statistical study which purported to show the possibility of race, gender and age discrimination?

3. Is petitioner entitled to raise an unexhausted claim that California's death penalty statute permits a defendant's age to serve as a factor in aggravation, and if he is entitled to raise the claim, does it violate the Constitution to consider age in

aggravation of a sentence, and was age used as a factor in aggravation at petitioner's trial?

4. Under the facts of this case, was it constitutional error to deny petitioner's inadequately justified request for a neurological examination which was made in conjunction with a post-conviction, post-appeal, habeas corpus claim?

5. Notwithstanding the fact petitioner was tried in a large county, and that state and federal courts repeatedly found, based on full and independent reviews of the record, that petitioner was not actually prejudiced by pretrial publicity, does a presumption of prejudice arise from the fact the media reported that federal and state prosecutors both wished to prosecute petitioner?



PARTIES

Petitioner, Robert Alton Harris, is a prisoner incarcerated under judgment of death at the California State Prison at San Quentin, California. Respondent, Reginald Pulley, is the warden of the California State Prison at San Quentin, California.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Petitioner seeks a petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Harris v. Pulley* (9th Cir. 1988) 852 F.2d 1546, as amended September 28, 1989. A copy of the original opinion of the Ninth Circuit issued July 8, 1988, reprinted with

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corrections July 11, 1988, is attached as Appendix A. The September 28, 1989, order, denying rehearing, rejecting the suggestion for rehearing en banc and amending the opinion, is attached as Appendix B.

JURISDICTION

Petitioner asserts jurisdiction of this Court pursuant to 28 U.S.C. 1254(1). (Petrn. 2.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies on United States Constitution, Fifth, Eighth and Fourteenth Amendments.

As this Court is aware, petitioner was sentenced under the 1977 California death penalty statute, which was replaced in 1978 by the substantially similar provisions now in effect. (*Pulley v. Harris* (1984) 465 U.S. 37, 39, fn. 1.) The current petition challenges former

California Penal Code section 190.3, which is attached as Appendix C.

STATEMENT OF THE CASE

A. Procedural History

On March 6, 1979, petitioner was sentenced to death for the murder of two teenaged boys on July 5, 1978,^{1/} in San

1. Petitioner was charged with, and convicted of: two counts of murder, two counts of robbery, two counts of kidnapping, one count of receiving stolen property and one count of being a convicted felon in possession of a concealable firearm. (Cal. Pen. Code, §§ 187, 209, 211, 496.1, 12021.) The murders were found to be in the first degree and three special circumstances (murder committed during a robbery, murder committed during a kidnapping for the purpose of robbery, and multiple murder), making appellant eligible for the death penalty, were found true as to each murder count. (Former Pen. Code, § 190.2; CT 944-978.) At the penalty phase of trial, the jury declared the penalty to be death for each murder. (CT 987.) The death judgments were ultimately pronounced by the trial court. (CT 873-882, 989-993.)



Diego, California. (CT 873-882, 989-993.)^{2/}

On February 11, 1981, the California Supreme Court affirmed the convictions and death sentences on direct appeal and denied a simultaneously filed petition for writ of habeas corpus. (*People v. Harris* (1981) 28 Cal.3d 935.) This Court denied certiorari. (*Harris v. California* (1981) 454 U.S. 882.)

In November of 1981, the Superior Court for the County of San Diego denied a second state habeas corpus petition. The California Supreme Court did the same and this Court denied certiorari. (*Harris v. California* (1982) 457 U.S. 1111.)

On March 5, 1982, petitioner filed his first federal petition for habeas corpus relief under 28 U.S.C. § 2254 in

2. "CT" refers to the clerk's transcript of the state trial and "RT" to the reporter's transcript. "ECR" refers to the excerpts of the clerk's record filed in the Ninth Circuit.



the United States District Court for the Southern District of California (CV 82-0249), hereinafter "*Harris I.*" On March 12, 1982, the district court denied the petition without an evidentiary hearing. A certificate of probable cause issued and the denial of the petition was appealed to the Ninth Circuit. (Appen. A, pp. 8344-8345.)

In *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, the Court of Appeals affirmed some issues but vacated the district court's denial of the first federal petition because the California Supreme Court did not undertake proportionality review of petitioner's sentence. (*Id.*, at pp. 1196-1197.) The district court was ordered to request and examine the state court record to determine if the record supported the state court's findings on discrimination and pretrial publicity claims.



(*Harris v. Pully, supra*, 692 F.2d at p. 1200.) As to petitioner's discrimination claims, the district court was ordered, if necessary, to provide an opportunity to develop the factual basis and arguments concerning race and gender discrimination claims. (*Id.*, at p. 1197.)

This Court granted California's petition for certiorari on the issue of proportionality review and reversed the Ninth Circuit, concluding California's death penalty scheme is constitutional without comparative proportionality review. (*Pulley v. Harris, supra*, 465 U.S. 37.)

While "*Harris I*" was under review in the Ninth Circuit in 1982, petitioner filed a second petition for a writ of habeas corpus in San Diego Superior Court. The petition was denied by the superior court and the California Supreme Court. Thereafter, in August of 1982, petitioner

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The petition was denied by the California

highest court in San Francisco, and the

issued a second petition for writ of habeas

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will be denied a writ of habeas corpus

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filed a second habeas corpus petition pursuant to 28 U.S.C. § 2254 in district court (CV 82-1005), hereinafter "*Harris II*." (Appen. A, p. 8345.)^{2/}

Following remand of *Harris I*, the district court consolidated the remaining issues with *Harris II*. On July 26, 1984, the district court denied all claims presented in *Harris II*, and asked for additional briefing on the pretrial publicity issue which remained from *Harris I*. (ECR Exh. L, Doc. 32.) On October 17, 1984, the district court denied relief on the pretrial publicity claim. (ECR Exh. M, Doc. 40.) A

3. The issues presented in *Harris II* included: (1) the constitutionality of "death qualification" of the jury, (2) the presentation of nonstatutory aggravating circumstances to the jury, (3) ineffective assistance of counsel at the penalty phase, and (4) denial of due process for failure to grant a post-conviction request for a neurological examination. (Appen. A, p. 8346.)

2. The second condition is that the person must be a resident of the State of New York at the time of the commission of the crime. (Section 100.0, Penal Law, New York.)

3. The third condition is that the person must be a resident of the State of New York at the time of the commission of the crime. (Section 100.0, Penal Law, New York.)

4. The fourth condition is that the person must be a resident of the State of New York at the time of the commission of the crime. (Section 100.0, Penal Law, New York.)

5. The fifth condition is that the person must be a resident of the State of New York at the time of the commission of the crime. (Section 100.0, Penal Law, New York.)

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9. The ninth condition is that the person must be a resident of the State of New York at the time of the commission of the crime. (Section 100.0, Penal Law, New York.)

10. The tenth condition is that the person must be a resident of the State of New York at the time of the commission of the crime. (Section 100.0, Penal Law, New York.)

certificate of probable cause was issued October 29, 1984. (ECR Exh. O, Doc. 42.)

The matter rested with the Ninth Circuit Court of Appeals until July 8, 1988, when they affirmed the order of the district court denying the habeas corpus petitions. (Appen. A.)

Petitioner's petition for rehearing was denied, the suggestion for rehearing en banc was rejected, and the opinion was modified on September 28, 1989. (Appen. B.)

B. Statement of Facts

The following statement of facts is taken from this Court's opinion in *Pulley v. Harris, supra*, 465 U.S. 37.

"The evidence at trial established that on July 5, 1978, respondent [Harris] and his brother decided to steal a getaway car for a bank robbery in Mira Mesa, Cal. Respondent approached two teenaged boys eating hamburgers in their car, and forced them at gunpoint to drive him to a nearby wooded area. His brother followed. They parked the cars, and walked

partway up a trail. Respondent told the boys he was going to use their car to rob a bank. They offered to walk to the top of the hill, wait a while, and then report the car as stolen, giving misleading descriptions of the thieves. Respondent approved the plan, but when one of the boys moved off into the bushes, he shot the other. He pursued and killed the fleeing boy, then returned and fired several more shots into the body of his first victim. Respondent finished the boys' hamburgers, and he and his brother then went ahead with the bank robbery. They were apprehended soon thereafter and confessed to the killings and the robbery." (*Pulley v. Harris, supra*, 465 U.S. at pp. 38-39, fn. 1.)

In addition to the above discussion about the circumstances of the offense, this Court also discussed the evidence produced at the penalty phase of trial.

"At that hearing [penalty phase], the State introduced evidence that respondent had been convicted of manslaughter in 1975; that he had been found in possession of a makeshift knife and a garrote while in prison; that he and others had sodomized another inmate; and that he had threatened that inmate's life. Respondent took the stand and testified to his

dismal childhood, his minimal education, and the conviction of his father for sexually molesting respondent's sisters. He stated that his brother had fired the first shots and that he was sorry about the murders. The jury was then provided with a list of factors to help it decide upon a penalty. It chose death." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 39, fn. 1.)

ARGUMENT

Before discussing the specific contentions raised by petitioner, it is worth noting that each of the issues raised by petitioner depends on the specific facts of the case. The petition itself reads like an appeal rather than a justification for invoking this Court's jurisdiction to resolve issues of national import. None of the issues are worthy of certiorari. This Court does not sit to satisfy a scholarly interest in intellectually interesting issues, nor does it sit for the benefit of particular



litigants. (*Rice v. Sioux City Cemetery* (1955) 349 U.S. 70, 74.) Nor is certiorari granted to review evidence and discuss specific facts. (*United States v. Johnson* (1925) 268 U.S. 220, 227.) Consequently, the petition should be summarily denied.

I

THE CONSTITUTION DOES NOT
PROHIBIT THE USE OF ANTI-SOCIAL
PERSONALITY EVIDENCE IN THE
PENALTY PHASE OF CAPITAL CASES

Petitioner initially argues this Court should grant certiorari because the prosecution used the fact petitioner is an "anti-social personality," also referred to as "psychopathic" or "sociopathic" personality,^{4/} as an affirmative factor in

4. Antisocial personality is a personality disorder recognized by the American Psychiatric Association, and was listed as No. 301.70 in DSM-III: *Diagnostic and Statistical Manual of Mental Disorder* (3d. Ed. 1980), hereinafter referred to as "DSM-III." It is one of several personality disorders characterized by deeply ingrained maladaptive patterns of

1. Antisocial personality disorder is a personality disorder characterized by a pattern of behavior that is consistently antisocial and lacks remorse. It is listed as No. 301.70 in the DSM-IV. It is also known as "sociopathy" and "psychopathy". It is one of several personality disorders characterized by deeply ingrained maladaptive patterns of

aggravation at the penalty phase of trial. He argues "anti-social personality," by virtue of its status as a personality disorder recognized by the American Psychiatric Association, may not, as a matter of constitutional law, be used as a circumstance to argue for the death penalty. (Petrn. 17-24.) Certiorari is not warranted on this issue.

This Court's recent decision in *Penry v. Lynaugh* (1989) 492 U.S. ____ [106 L.Ed.2d 256] addressed and rejected similar claims. In *Penry*, this Court reversed the death sentence of a mentally retarded man because the instructions given the jury might not have adequately informed the jury they could consider *Penry's* mental disorders (retardation and history of child abuse) as mitigating circumstances. (*Penry v. Lynaugh, supra*, 106 L.Ed.2d at p. 284.)

behavior. (DSM-III § 301.)

circumstances. (Perry v. United States, 1972, 408 U.S. 373, 384.)

informed the jury that the defendant's mental condition was such that he was not responsible for his actions.

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At Penry's trial, the prosecution presented expert testimony from two psychiatrists who testified Penry had a "full blown anti-social personality." The death penalty was urged as a result of that evidence. (*Penry v. Lynaugh, supra*, 106 L.Ed.2d at p. 272.) Although it reversed the case because the jury may have been misled about their ability to use Penry's mental conditions in mitigation, this Court noted evidence of mental retardation and prior abuse is a "two-edged sword" which may both diminish personal blameworthiness even as it indicates there is a probability of future dangerousness. (*Id.*, at p. 281.) Hence, this Court has expressly recognized that mental disorders, defects or diseases are not exclusively mitigating or aggravating. Consequently, there is no constitutional infirmity to a system which allows the sentencer to consider and give effect to

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Consequently, there is no possibility

not exclusively arising in any form

mental disorder, before it becomes the

this Court has consistently held that

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indicated that it is not the duty of

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stated. The Court has consistently

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Court to determine the merits of the

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is applied correctly and whether the

facts are correctly stated. The Court

has consistently held that it is not

the duty of the Court to determine

the merits of the case, but to

determine whether the law is applied

evidence of a mental disorder in determining if death is the appropriate punishment. (*Penry v. Lynaugh, supra*, 106 L.Ed.2d at p. 292.)

In this case, the sentencer was allowed to consider and give full effect to evidence of petitioner's psychopathic personality.^{2/} They were allowed to fully

5. At the penalty phase, petitioner admitted he previously lied to the jury and in fact killed his two young victims. He claimed remorse. He blamed his crimes on an abysmal childhood which had warped his sensibilities and made him worthy of mercy.

In rebuttal, the prosecution offered the testimony of a psychiatrist, Dr. Wait Griswold, who had examined and tested petitioner and had studied reports on his background. Dr. Griswold diagnosed petitioner as a psychopath, also known as sociopath, or anti-social personality. This "character difficulty or disorder" is neither a neurosis, nor a psychosis, and it does not interfere with the ability to control or to understand the criminality of one's conduct. (RT 5650-5656.) Dr. Griswold described such persons as immature, emotionally unstable, callous, rigid, irresponsible, impulsive, unremorseful, egotistical, unable to profit from past experience or punishment and inclined to

consider his character and mental condition as either aggravation or mitigation. As this Court has unswervingly held, the character and propensities of the offender must be considered by the sentencer in any valid capital sentencing system. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Gregg v. Georgia* (1976) 428 U.S. 153, 189, 199; *Furman v. Georgia* (1972) 408 U.S. 238.)

Evidence concerning petitioner's anti-social personality was used by both the prosecution and defense. Based on Dr. Griswold's testimony, the defense argued petitioner's psychopathic condition was environmentally induced and made petitioner a victim worthy of mercy. (RT 4757-4759.)

The prosecution argued the other edge of the sword. It used the testimony to

project blame on others. (RT 4654, 4656.)

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corroborate evidence which showed petitioner lacked remorse. Remorse is inconsistent with the psychopathic character while manipulative feigning of remorse is entirely consistent with it. (RT 4650-4657, 4710.) This Court has universally recognized and approved of the use of evidence of remorse in the penalty determinations of capital cases. (See, e.g., *Jurek v. Texas* (1976) 428 U.S. 262, 273; *Estelle v. Smith* (1980) 451 U.S. 454, 460; *Wainwright v. Goode* (1983) 464 U.S. 78, 80; *Strickland v. Washington* (1984) 466 U.S. 668, 673.)

Further, the testimony was used to support other evidence that rehabilitation is not a realistic expectation for petitioner. (RT 4706-4707.) The diagnosis of "psychopath" merely provided a label for the essential points that petitioner is a dangerous, unremorseful man who has committed terrible crimes and

cannot be expected to change. (RT 4702-4728.) This, too was a proper use of the evidence. In *Jurek*, the Texas penalty statute was upheld with express understanding that one of the critical jury questions (future dangerousness) could be answered against the defendant on the basis of psychiatric evidence that he has a "sociopathic personality," lacks remorse, and is unlikely to change.

(*Jurek v. Texas*, *supra*, 428 U.S. at p. 273; see also, *Pyles v. State* (Tex.Crim.App. 1988) 755 S.W.2d 98, 123.) Moreover, psychiatric testimony regarding unamenability to rehabilitation (future dangerousness) was expressly found proper in *Barefoot v. Estelle* (1983) 463 U.S. 880, 896-903, where this Court noted that calling for an abolition of such testimony "is somewhat like asking us to disinvent the wheel." (*Id.*, at p. 896.)

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The instructions given here told the jury to "consider all of the evidence which has been received as to any matter relevant to aggravation, mitigation and sentence." (RT 4790.) The jury was further instructed to "consider, take into account and be guided by the following factors, if applicable: . . ." Among the factors listed are, "[t]he defendant's character, background, history, mental condition and physical condition." (RT 4790, 4792.) Under prevailing California law, these factors could be either aggravating or mitigating.^{6/}

6. The California Legislature specified in its capital sentencing statutes that:

"In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to *any matter relevant to aggravation, mitigation, and sentence*, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the

Based on the foregoing, it is obvious the sentencing scheme employed at petitioner's trial met the requirements of *Penry* and its predecessors and allowed the penalty jury to fully consider the mental state evidence. Consequently, this Court should deny the writ on that basis alone.

Further, the entire premise underlying petitioner's argument is faulty.^{2/} Just because a group of

defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence and the defendant's character, background, history, mental condition and physical condition." (Former Cal. Pen. Code, § 190.3, emphasis added.)

7. The evidence at trial stands uncontradicted that petitioner is a psychopathic killer. Petitioner's position that the jury should have been precluded from learning this, or they should have been instructed it can only be considered as mitigation, is antithetical to this Court's precedent and does violence to common sense.

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psychiatrists are capable of labeling a behavioral pattern does not create a condition of constitutional significance. As the Ninth Circuit observed below, the DSM was designed to identify conditions which members of the American Psychiatric Association may diagnose, and those diagnoses described as "mental disorders" have long been determined by societal morals and conventions, rather than by the presence of disease or illness. (Appen. B, pp. 12159-12163.)

The fact a group of psychiatrists are capable of describing a pattern of behavior should not forever bar a prosecutor from using that description (or

The essential components of the diagnosis of anti-social personality, as argued to the jury, are remorselessness and unamenability to rehabilitation. Thus, the thrust of petitioner's position is that, as a matter of federal constitutional law, the death penalty is *more appropriate* for killers who are remorseful and are capable of rehabilitation than for those like petitioner who are neither.

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like petitioner who are not.

the underlying characteristics) to argue for the death penalty. To extend such power to a group of psychiatrists is to stand the law on its head. The Ninth Circuit agreed the American Psychiatric Association could not be allowed to define the constitutional boundaries of capital punishment in this country. (Appen. B, pp. 12162-12163.) As the lower court observed, according to the American Psychiatric Association, persons with a psychopathic personality are capable of understanding the consequences of their actions and willingly perform (or do not perform) particular volitional acts. (Appen. B, p. 12162.) "Anti-social," "psychopathic," and "sociopathic" personality are a psychiatrist's way of saying a person is "just plain mean." Such characteristics are clearly appropriate for a capital sentencer to consider.

disapplied this Court's decision in

The most feared killer is the psychopathic killer, the one who feels no remorse and presents no likelihood of rehabilitation. If there is a single best example of the killer for whom the death penalty was intended it is the psychopathic killer. To deny the jury this information would be a fundamental failure of justice. To tell them they may only consider it as a matter in mitigation would be a public scandal. A writ of certiorari on this issue is unwarranted.

II

CERTIORARI IS NOT WARRANTED TO
REVIEW THE DISTRICT COURT'S
DENIAL OF PETITIONER'S MOTION
FOR DISCOVERY

Petitioner next urges this Court to grant certiorari to review the district court's denial of his request for discovery in conjunction with his claims of race, gender and age discrimination. He further contends the Court of Appeals misapplied this Court's decision in

annulled this Court's decision in

He further contended the Court's

of race, gender and age discrimination.

discovery is inconsistent with the

Court's denial of his request for

quasi-judicial review of the

decision.

THE COURT

ORDERED

that the

decision

be

reversed

and the

case

remanded

to the

lower

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with

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to the

appellee.

IT IS SO ORDERED.

McCleskey v. Kemp (1987) 481 U.S. 279, in affirming the district court's ruling. (Petn. 24-37.) This Court should deny the writ.

A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues, nor does it sit for the benefit of the particular litigants.

(*Rice v. Sioux City Cemetery* (1955) 349 U.S. 70, 74.) Certiorari is not granted to review evidence and discuss specific facts. (*United States v. Johnson* (1925) 268 U.S. 220, 227.)

The issue presented here is whether the Ninth Circuit properly affirmed the district court's exercise of discretion in denying petitioner's discovery motion in *Harris I*. Whether an application for

discovery should be granted necessarily depends on the specific showing before the district court. Consequently, this Court should not expend its scarce resources resolving disputes involving the exercise of discretion.^{2/}

Furthermore, certiorari should be denied because of the patent lack of merit to petitioner's claim. The discovery sought was either irrelevant to any proper claim or was a public record readily available to petitioner without the need of any discovery order. (Appen. A, pp. 8375-8376, fn. 5.)^{2/}

8. Petitioner moved for discovery under rule 6(a) of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254 (1982). Rule 6(a) provides for discovery in habeas corpus proceedings "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."

9. Petitioner's claim that denial of his discovery motion by the district court hobbled him in making the required showing is a transparent sham. All the material requested was a matter of

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3. Petitioner's claim that he is of his discovery solely by the fact that court hobbled him in making the discovery is a transparent sham. It is material requested was a matter of

To be entitled to an evidentiary hearing (and discovery), petitioner was required to demonstrate, (1) facts which, if proved, would entitle him to relief, and (2) that an evidentiary hearing is required to establish the truth of his allegations. (*Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1197; *Pierce v. Cardwell* (9th. Cir. 1978) 572 F.2d 1339, 1340-1341.) Petitioner's complete failure to meet the first prong of the test doomed his discovery motion to failure.

public record. (Cal. Govt. Code, § 6260; *Matter of Hearst's Estate* (1977) 67 Cal.App.3d 777.) All petitioner had to do was walk into the court clerks' offices and request the records, which is the same thing the State would have had to do if ordered to comply with petitioner's discovery request.

Further, at least as to the only records arguably relevant (item 8), petitioner even admitted he could obtain them by his own efforts. (ECR, Exh. F, p. 6, lines 13-17.) Since petitioner bore the burden of proof on the petition, it was hardly startling the district court ruled he had to do his own leg work.

Though he was given a full opportunity to demonstrate what evidence might exist to prove his claim of purposeful discrimination, petitioner could not present evidence which met the threshold showing. All he could muster were the declarations of statisticians James Cole and David Baldus (the statistician from *McCleskey v. Kemp*, *supra*, 481 U.S. 279) who stated the information sought by way of discovery would show disparities in data generally consistent with discrimination based on the race of the victim. It would also show a male between the ages of 25 and 34 stands a greater chance of receiving a death sentence. Inasmuch as petitioner's Eighth and Fourteenth Amendment claims were entirely dependant on statistical proof, the district court and the Ninth Circuit properly denied discovery since

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such claims are not amenable to such proof.^{10/}

A. Proof of Purposeful Discrimination

Underlying petitioner's Fourteenth Amendment claim was the requirement he show "purposeful discrimination." As this Court made clear in *McCleskey v. Kemp*, *supra*, 481 U.S. 279:

"[A] defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.' [Citation.] A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination 'had a discriminatory effect' on him.

10. Petitioner now claims he did not indicate to the district court that he intended to exclusively rely on the statistical study to support his request for an evidentiary hearing and discovery. (Petr. 28-29.) He does not say what these other materials are and he never presented them below. Furthermore, his request for discovery related exclusively to data he intended to use in his statistical study. Consequently, even if petitioner "sandbagged" the district court, he must not be allowed to rely on such actions as justification for this Court invoking its jurisdiction.

12. Furthermore, we must not indicate in the future that we intended to exclusively rely on statistical data in support of our for an exclusively hearing and discovery. From 1961 to 1963, any that these other materials we have never presented them before. Furthermore, the report has been retained exclusively as data as to use in the statistical study. Consequently, even if presented "sandbagged," the district court, we not be allowed to rely on such evidence as justification for this Court finding the jurisdiction.

[Citation.] Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." (*McCleskey v. Kemp*, *supra*, 481 U.S. at p. 292.)

The ultimate impact of *McCleskey* on the present case is that this Court firmly rejected as "clearly insufficient" a fully developed and enormously sophisticated statistical study purporting to show discrimination. *McCleskey* not only rejected the statistical showing made in that case; it further stated it agreed with "every other court that has considered such a challenge." (*McCleskey v. Kemp*, *supra*, at p. 292, fn. 9.)

The completed study by Professor David Baldus from *McCleskey* is expressly the model on which petitioner hoped to develop his own study. In fact, petitioner based his district court showing on a declaration by the same

were likely to be sentenced to

Professor Baldus. (ECR, Tab D, Exh C, p. 4.) There was no hint Baldus' approach might be any stronger in California than it was in Georgia. In fact, the evidence shows it would be weaker.

In equal protection claims, *McCleskey* teaches that statistical proof can establish purposeful discrimination only in "rare cases" where there is a "stark pattern" such as that demonstrated in *Gomillion v. Lightfoot* (1960) 364 U.S. 339, and *Yick Wo v. Hopkins* (1886) 118 U.S. 356. The rare exceptions to this rule, jury venire cases, and employment discrimination cases, are manifestly inapplicable in the complex and necessarily discretionary capital punishment context. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 293-294.) The Baldus study (which purported to show that murderers of white victims were 4.3 times more likely to be sentenced to death) was

a far cry from the "stark pattern" necessary "to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose." Indeed, this Court twice quoted Professor Baldus who conceded such statistical studies are simply incapable of proving purposeful discrimination in a given case. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 293, fn. 11, 308, fn. 29.)

With *McCleskey* as a matrix, the Ninth Circuit carefully evaluated the proof submitted by petitioner and concluded (as did the district court), even assuming the truth of his allegations, he was not entitled to discovery or an evidentiary hearing. (Appen. A, pp. 8378-8381.) The statistics did not, and could not, show "exceptionally clear proof" of race, gender or age discrimination. (*McCleskey v. Kemp*, *supra*, at p. 8381.) There is no need for this Court's review.

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V. Kasey, supra, at 9, 511 U.S. 1000, 1001.

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B. Eighth Amendment Claim

As to the Eighth Amendment claim, this Court noted a statute which passes constitutional muster necessarily narrows the category of capital eligible cases in a reasoned way, and focuses discretion on the particularized nature of the crime and the particularized character of the defendant. Thus:

"[W]e lawfully may presume that [a death sentence imposed under such a statute] was not 'wantonly and freakishly' imposed [citation], and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment." (*McCleskey v. Kemp*, *supra*, 481 U.S. at p. 308.)

To overcome this presumption, a defendant must demonstrate the risk of discriminatory influence (inherently present in any discretionary system) has reached the level of being constitutionally unacceptable. (*Ibid.*) California's statute has been held to pass

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constitutional muster in an earlier manifestation of this very case. (*Pulley v. Harris* (1984) 465 U.S. 37.)

In *McCleskey*, this Court emphasized and re-emphasized the essential complexity of the capital sentencing process, and the constitutional prerequisite of substantial discretion after the eligible cases have been properly narrowed. This Court quoted the Eleventh Circuit's analysis of the process, noting that the statistical approach taken by Baldus ignored reality. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 289-291.) This Court went on to point out that apparent disparities are inevitable and are a far cry from the major systemic defects identified in *Furman v. Georgia*, *supra*, 408 U.S. 238. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 312-313.) This Court concluded:

"Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is

unexplained is invidious."
(*McCleskey v. Kemp, supra*, 481
U.S. at p. 313.)

When the Ninth Circuit analyzed petitioner's offer of proof in the context of *McCleskey*, it determined at most, his showing would demonstrate a discrepancy that may correlate with the race of petitioner's victims, his gender and age. (Appen. A, pp. 8383-8385.) Such a showing was insufficient for an evidentiary hearing or the ordering of massive discovery.

Finally, it is important to note *McCleskey* came forward with a full study for examination. In the face of this Court's utter rejection of that completed effort, petitioner's request for time and resources to conduct his hypothetical future study was particularly inappropriate. By virtue of his offer of proof petitioner demonstrated his intention to follow the fully discredited

footsteps of the Baldus study. To have allowed this would be to conclude that every capital petitioner (or every criminal defendant whatever his crime or sentence) is entitled, as a matter of law, to the full resources of the federal courts for the purpose of exploring the wholly speculative and highly doubtful possibility of constructing a study demonstrating the "stark pattern" required by *McCleskey*. This would be a completely improper and unwarranted squandering of judicial resources. So too, would be the granting of the writ.

III

CERTIORARI IS NOT WARRANTED TO
REVIEW PETITIONER'S UNEXHAUSTED
AND MERITLESS CLAIM THAT
CALIFORNIA UNCONSTITUTIONALLY
PERMITS A DEFENDANT'S AGE TO
SERVE AS A FACTOR IN AGGRAVATION

Petitioner next contends this Court should grant certiorari because the California statute improperly permitted his age to be used as a circumstance in

aggravation. (Petn. 37-44.) The claim was never exhausted in state court and is meritless in any event.

A state prisoner who seeks relief under 28 U.S.C. § 2254 must provide the state courts a fair opportunity to correct any federal constitutional error committed in the trial court. Thus, the habeas petitioner must have fairly presented to the state court the substance of his federal habeas corpus claim. (*Anderson v. Harless* (1982) 459 U.S. 4, 6 (per curiam); *Picard v. Conner* (1971) 404 U.S. 270, 275-276.)

The Ninth Circuit engaged in a careful examination of the record (state and federal) in disposing of the claim. (Appen. A, pp. 8385-8389.) The Court of Appeals requested supplemental briefs with attached exhibits to demonstrate wherein petitioner raised this issue in state and

likewise, the Ninth Circuit reviewed



federal proceedings. (Appen. A, at p. 8387.)

Petitioner never raised this precise issue in the district court. Although he contended he was the victim of age discrimination, he never claimed the California law was unconstitutional because age could be used as an aggravating factor. (Appen. A, pp. 8386-8387.) In his supplemental brief, petitioner failed to show he raised this contention in state court. What he proffered as evidence was a generalized assertion California fails to inform the jury which sentencing factors listed in the statute are "aggravating" or "mitigating." (Appen. A, pp. 8387-8388.) As the appellate court noted, that contention was rejected in petitioner's earlier appeal in federal court. (*Harris v. Pulley, supra*, 692 F.2d at p. 1194.) Likewise, the Ninth Circuit rejected

Likewise, the Sixth Circuit rejected

v. Bailey, supra, 523 F.2d at 9, 10.

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petitioner's misrepresentation that the issue was raised in his state habeas corpus petition. (Appen. A, pp. 8388-8389.)

Because of petitioner's failure to raise the issue in either federal or state court, the Ninth Circuit properly refused to reach the issue on the merits. (Appen. A, p. 8389.)

Petitioner contends the exhaustion doctrine should not apply to him because the California Supreme Court has ruled on the issue in other cases which would render his action futile. (Petrn. 38, 40, fn. 8.) On the contrary, it should apply to him.

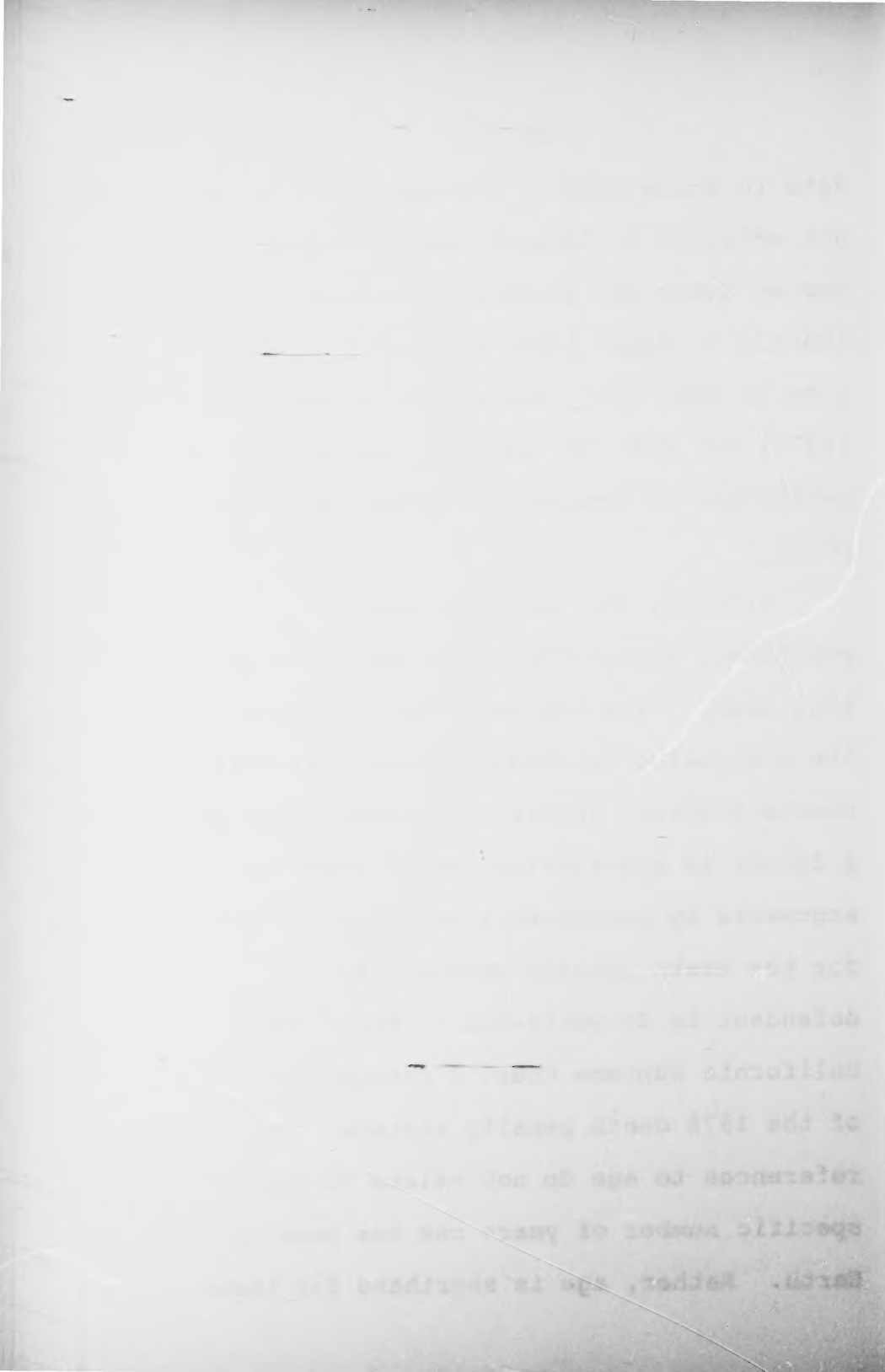
In *People v. Lucky* (1988) 45 Cal.3d 259, and *People v. Babbitt* (1988) 45 Cal.3d 660, the California Supreme Court rejected a similar argument properly presented under California's 1978 statute. However, what petitioner fails to tell

this Court is that certiorari was denied in those cases even though the issue was squarely presented and properly preserved in state court. (*Lucky v. California* (1989) ___ U.S. ___ [102 L.Ed.2d 980]; *Babbitt v. California* (1989) ___ U.S. ___ [102 L.Ed.2d 981].) If certiorari is not appropriate where the issue is properly preserved and presented, it clearly is unwarranted in this case.

Petitioner's failure to properly present the issue to the California Supreme Court on direct appeal is fatal to further review. The issue was one which could have been raised on direct appeal. It is settled in California that habeas corpus does not lie as a substitute for an appeal or as a second appeal. (*In re Terry* (1971) 4 Cal.3d 911, 927; *In re Eli* (1969) 71 Cal.2d 214, 219.) Thus, petitioner is barred under California law from bringing this argument at this late

date in state court. Consequently, he is not entitled to federal habeas corpus review under the procedural default rule. (*Harris v. Reed* (1989) 489 U.S. ____ [103 L.Ed.2d 308, 319]; *Wainwright v. Sykes* (1977) 433 U.S. 72, 86-87.) Nor should petitioner be granted certiorari on this point.

Finally, the issue is simply meritless, especially so on the facts of this case. From the petition, one gets the misleading impression California trial courts instruct jurors to "consider age as a factor in aggravation" which leads to arguments by prosecutors which say, "vote for the death penalty because the defendant is 25-years-old." Under the California Supreme Court's interpretation of the 1978 death penalty statute, the references to age do not relate to the specific number of years one has been on Earth. Rather, age is shorthand for those



factors related to age (experience, physical maturity or infirmity, emotional maturity) which may be properly argued in mitigation or aggravation. (*People v. Lucky, supra*, 45 Cal.3d at pp. 301-302.) Such an interpretation does not violate the Constitution.^{11/}

In this case, the trial court simply told the jury to take into account defendant's age at the time of the crime, *if applicable*. (RT 4790-4792.) The prosecutor did not argue age as an aggravating factor. To the contrary, he clearly implied age (youth) could only act as a mitigating factor but it was simply

11. Of course, as already noted, this Court has previously upheld the facial validity of the California death penalty statute which includes age as a factor for the jury to consider. (*Pulley v. Harris, supra*, 465 U.S. at p. 37.) Thus, petitioner is limited to showing how the statute, as applied to him, deprived him of his constitutional rights. He has not even attempted to do so.

not present here. (RT 4733.)^{12/}

Consequently, even if petitioner has properly preserved the issue, this Court's review is not necessary since his constitutional rights were not violated.

IV

CERTIORARI IS NOT WARRANTED TO
REVIEW THE STATE COURT'S REFUSAL
TO PROVIDE AN EEG EXAMINATION
THREE YEARS AFTER TRIAL

Petitioner next contends his constitutional rights were violated because the California Supreme Court denied his application for an Electro-Encephalogram ("EEG") in 1982, three years after petitioner's trial. (Petr. 45-52.) Certiorari is not warranted.

12. The prosecutor argued:

"You may consider the age of the defendant at the time of the crime. This defendant was 25-years-old at the time, had been in prison on two prior occasions, being on parole with a parole officer assigned to supervise and counsel him; not an impetuous youth, not a person immature and of youth, no. An adult and entitled to be treated by you as an adult." (RT 4733.)

This claim came in the context of petitioner's assertion he was denied effective assistance of counsel. Petitioner claimed his trial counsel was constitutionally deficient for failing to present evidence at the penalty phase of trial of a 1971 EEG which showed "abnormal persistent slow waves" (which might indicate organic brain damage) and for failing to request an additional EEG prior to trial.

The competency of counsel claim was denied because the record demonstrated trial counsel was aware of the 1971 abnormal EEG, and that he was also aware of a 1976 EEG which showed normal results. The district court found petitioner's claim failed under *Strickland v. Washington, supra*, 466 U.S. 668, 688, 695. Specifically, the court found that in view of the complexities of a capital trial counsel's tactical decision not to

introduce controverted evidence of possible brain damage or to pursue additional testimony did not fall outside the realm of acceptable professional assistance and given the weight of the evidence against petitioner, there was no prejudice. (ECR exh. L, pp. 10-11.) The Ninth Circuit held the failure of trial counsel to introduce EEG results or make a timely request for an addition EEG examination during trial did not overcome the strong presumption that counsel's actions were within the wide range of reasonable professional assistance.

(*Strickland v. Washington, supra*, 466 U.S. at p. 689; Appen. A, pp. 8364-8366.)

In 1982, three years after trial, petitioner sought an order in state court to have a new EEG conducted to support his ineffective assistance of counsel claims. The California Supreme Court denied the request. (ECR, Exh. B.) The Ninth

Circuit held petitioner had not made an adequate showing to justify the examination. He failed to show how a 1982 EEG would establish his mental state for 1978 crimes, and he failed to show how it would aid in evaluating trial counsel's performance based on an objective standard. (Appen. A, p. 8366.)

Contrary to the premise underlying petitioner's contention, there is no absolute federal constitutional right to a post-trial, post-appeal psychiatric examination. In *Ake v. Oklahoma* (1985) 470 U.S. 68, this Court held an indigent defendant is entitled to competent psychiatric assistance *at trial and during a penalty hearing* where there has been a showing the defendant's mental condition is *seriously* in question. (*Id.*, at pp. 82-84.) This Court in no way intimated that this conditional right to psychiatric assistance extended to appeal or habeas proceedings.



corpus. This Court certainly did not create an unconditional right to such assistance on appeal or habeas corpus.

Likewise, there is no absolute right in California. Penal Code section 987.9 requires a showing of reasonableness before a capital defendant is entitled to funds for investigation or other purposes necessary for the preparation or presentation of a defense.^{13/} Nowhere is it alleged that petitioner was denied psychiatric assistance pretrial or on appeal. He was given every opportunity possible to present every available defense and appellate issue. His belated request for an additional EEG was properly denied.

13. Penal Code section 987.9 was passed in 1977, nine years after the California Supreme Court decided *In re Ketchel* (1968) 68 Cal.2d 397, upon which petitioner relies. (Petn. 50-51, fn. 15.) However, even *Ketchel* does not purport to relate to habeas corpus proceedings.

Here, as noted by the Ninth Circuit, appellant's application for an EEG depended on his claim of ineffective assistance of counsel on habeas corpus. (Appen. A, p. 8366.) Thus, at most, a new EEG might have demonstrated some abnormalities in 1982. The significance of such a result four years after the crime was never revealed below and even if it might have supported an argument that petitioner should be spared because of a brain disorder, evidence of mental disorder is a "two-edged sword" and a reasonably competent attorney might not have presented such evidence. (See, *Penry v. Lynaugh*, *supra*, 106 L.Ed.2d at p. 281.)^{14/} Given the stark and grim reality

14. Also, at best a new EEG would have demonstrated a conflict in the evidence. Prior to the crime an EEG showed normal brain activity. Lacking conclusive proof of brain dysfunction, the decision not to present or seek such evidence would meet the constitutional standard of effective counsel. Of course, it is every bit as likely an

14. Also, as was noted, we have demonstrated a number of evidences. First, the patient showed normal brain activity. Second, the patient showed no evidence of selective control of brain activity. The decision not to present the evidence would meet the conventional standard of effective consent. Of course, it is every bit as likely as

of the trail of dead bodies left in petitioner's wake, it is unlikely in the extreme that a presentation of "persistent slow fade waves" etc. would have done much more than irritate the jury. Counsel's apparent decision not to dilute his moving and deeply human plea for mercy with such trivia was perfectly valid and should not be second guessed. Under the best of circumstances, a new EEG would not have overcome the presumption of competence. Thus, the California Supreme Court's denial of the application and the Ninth Circuit's affirmation of that order were completely justified.^{15/}

additional EEG would have revealed normal "waves."

15. Curiously, petitioner has not asserted ineffective assistance of counsel as a reason for this Court to grant certiorari. His failure to do so is an implicit recognition that his claim of ineffective assistance of counsel was correctly decided.

Furthermore, petitioner never sought to invoke the power of the federal district court to order an EEG

V

CERTIORARI IS NOT WARRANTED TO REVIEW THE DENIAL OF PETITIONER'S MOTION FOR CHANGE OF VENUE WHERE FULL AND INDEPENDENT REVIEWS OF THE UNDERLYING RECORD HAVE SHOWN THERE WAS NO ACTUAL PREJUDICE TO PETITIONER AS A RESULT OF PRETRIAL PUBLICITY

Petitioner next argues certiorari should be granted because he was prejudiced by a public dispute between federal and state prosecutors about which office would prosecute him first. He claims the dispute generated overwhelming hostility against him in the community and he therefore claims prejudice should be presumed under *Murphy v. Florida* (1975) 421 U.S. 794, *Sheppard v. Maxwell* (1966) 384 U.S. 333, *Estes v. Texas* (1965) 381 U.S. 532, and *Rideau v. Louisiana* (1963)

in conjunction with his habeas corpus petition below. He chose, instead to raise the purely legal issue recognizing the inherent inability to factually prove his claim of ineffective assistance of counsel.

373 U.S. 723. (Petn. 52-65.) Certiorari is not warranted. Petitioner's plea is based on a distorted view of the evidence below and a misapplication of this Court's precedent.

Petitioner has repeatedly presented this claim, pretrial publicity denied him a fair trial by an impartial jury, to five different courts. He overlooks the fact there have been separate state and federal court findings of fact on this issue, each of which rejected any claim of prejudicial pretrial publicity.

The trial court first denied petitioner's change of venue motion before jury selection began. The denial was based on a lengthy and detailed factual hearing. Every item of media coverage was reviewed, independently commissioned public opinion surveys were presented, and extensive argument surrounding the circumstances of the crime and the



pretrial proceedings was made. The trial court concluded there was no reasonable likelihood the pretrial publicity was of such a magnitude as to deny petitioner a fair trial. (See ECR, exh. K, app. 1.)^{16/}

16. Although petitioner's brutal and gratuitous murder of two teenage boys was shocking, and the media coverage was prominent initially, the bulk of the coverage occurred within the first four days, dropping off markedly after the victims' funerals (motion exhs. 01-029) and flaring up briefly after the preliminary hearing when defense counsel agreed to unsealing the transcript of that hearing (motion exhs. 044-046, A-Z). At the pretrial motion for change of venue, even petitioner's attorney admitted the bulk of the coverage took place within two weeks of the crime. (Motion transcript, p. 403.) The trial, however, did not begin until five months after the crime.

Also introduced at the pretrial motion was a survey conducted by Dr. Oscar Kaplan which demonstrated that by mid-August, 1978, (just one month after the crime) only 38 percent of the population of San Diego County recognized petitioner's name. Of this 38 percent, only 66 percent knew petitioner had killed two teenagers, only 23 percent knew he had a prison record, and only 7 percent knew his brother had confessed implicating him. (Motion transcript, pp. 69, 79-80.) Given the huge geographic and population size of San Diego County this lack of

Following voir dire, the change of venue motion was renewed. Again, the trial court rejected the motion. The trial court witnessed the voir dire of prospective jurors and specifically found the jury was fair and untainted by pretrial publicity. (ECR, Tab K, app. 3, p. 2421.)^{17/}

impact is not surprising. The trial court took judicial notice that San Diego County contained 1,677,800 persons and sprawled across 4,261 square miles of land. (Motion Transcript, at p. 178.)

17. The jury selection process was conducted in private and prospective jurors were questioned individually, thereby significantly enhancing the reliability of the prospective juror's statements. (*Patton v. Yount* (1984) 467 U.S. 1025, 1034-1035, fn. 10.) In denying the renewed change of venue motion after the completion of voir dire, the trial court stated:

"I was impressed with the forthrightness of the jurors. I think the fact that they were interviewed individually and questioned individually even increases the desire on the part of the juror to tell us precisely what their feelings were . . . I saw nothing . . . in the



Harris' petition for a writ of mandate from the California Supreme Court to compel the trial court to grant the change of venue motion was denied. (Appen. A, p. 8348.)

On direct appeal, the California Supreme Court conducted an independent review of the trial court record and found the large size and diversity of San Diego County dissipated the effect of the pretrial publicity. The California Supreme Court also found the voir dire demonstrated there had been no prejudicial

examination to indicate to me that the jury or in any sense there was a feeling of hostility, that there was antagonism, that there was a knowledge so great as to create an atmosphere that would not allow for a fair trial. As a matter of fact, I think the reverse is true. I am satisfied that the jury that has been selected was very fairly selected." (ECR Exh. K, app. 3, pp. 2421-2422.)

effect from the pretrial publicity.

(*People v. Harris* (1981) 28 Cal.3d 935, 948-950.)

The issue was then presented to this Court. Certiorari was denied. (*Harris v. California* (1981) 454 U.S. 882, cert. petn. pp. 7-11.) The issue did not improve with time.

In petitioner's first federal habeas corpus petition, he again raised the issue. The district court denied the petition. The Ninth Circuit remanded on this issue because the record from the district court did not reveal whether it had examined all relevant parts of the state court record. (Appen. A, p. 8349.)

On remand from the Ninth Circuit Court of Appeals, the district court examined all aspects of the state court record. It examined all exhibits presented at the change of venue motion, the transcript of that motion, and voir



dire of the jury. The district court ruled the state court findings were fairly supported by the record. Specifically, the district court found: (1) the publicity surrounding the trial did not warrant a presumption of prejudice; (2) no "public passion" pervaded the trial; (3) the bulk of potentially inflammatory media coverage occurred within the first two weeks after the crime; (4) the voir dire record of the impaneled jury proved their impartiality and refuted petitioner's claim they were tainted; and (5) the five months between the crime and trial dissipated the impact of the initial publicity of the case. (ECR Exh. M.) In rejecting petitioner's claim of actual prejudice, the district court found it significant that only 19 of 104 potential jurors were excused based on their having prejudged the case. That percentage (18 percent) was less than the percentage



which this Court found acceptable in *Murphy v. Florida, supra*, 421 U.S. 794, 803 (27 percent, 20 from a pool of 78). (ECR Exh. M.)

In rejecting petitioner's claim the dispute between the federal and state prosecutors created a circumstance warranting a presumption of prejudice, the Ninth Circuit undertook yet another complete and independent analysis of the purported dispute. (Appen. A, pp. 8352-8355.) The Court of Appeals concluded the facts did not reveal a general atmosphere in the community or courtroom which was so inflammatory as to deny petitioner a fair trial by impartial jurors. (Appen. A, at p. 8355.) Rather, the Court of Appeals characterized the public discussion as a simple dispute focused on the merits of each criminal system in the context of the particular case. Most significantly, the dispute was short-lived (spanning a brief case and to report any other case. Appen. A, p. 8355.)

two and one-half week period in the early part of the five months between the crime and trial) and did not involve a prejudgment by either office as to petitioner's guilt. (Appen. A, at p. 8355.)^{18/}

Petitioner is not seeking to expand constitutional jurisprudence by virtue of this issue. Instead, he is seeking this Court's review of the facts to determine

18. Petitioner attempts to derive some significance from the fact a woman overheard a discussion of petitioner's case in the "jury lounge." (Petr. 61-62.) From petitioner's reference to "jury lounge" one could get the misleading impression he is speaking of a small room where a dozen people relax during breaks in proceedings, rather than the cavernous room where hundreds of prospective jurors are gathered each day to fill venires in all of downtown San Diego's criminal and civil courtrooms.

Moreover, as the Ninth Circuit noted, when it was brought to the attention of the trial court that there was some discussion of petitioner's case in the jury lounge, the court specifically cautioned the prospective jurors to avoid any discussion of the case and to report any contacts. (Appen. A, p. 8358.)

if he is entitled to a presumption of prejudice by virtue of the pretrial publicity. This Court has made it very clear it will not grant certiorari to review evidence or to discuss specific facts. (*United States v. Johnson, supra*, 268 U.S. at p. 227.) This issue has been carefully examined and findings of fact have been made at the trial court level, on direct appeal, in the federal district court and the Court of Appeals. The findings made by the lower courts are entitled to great deference by this Court. (See, *Anderson v. Bessemer City* (1985) 470 U.S. 564, 573-575.) More to the point, a state trial court's findings of fact with respect to the prejudicial effect of pretrial publicity are presumed correct. (*Patton v. Yount* (1984) 467 U.S. 1025, 1031-1032; *Sumner v. Mata* (1981) 449 U.S. 539, 550.) Petitioner has not presented a credible justification why this Court

should ignore presumptively correct findings of fact made at every level of state and federal court and conduct its own factual inquisition. Thus, certiorari should not be granted.

Additionally, petitioner's reliance on *Sheppard*, *Estes* and *Rideau* to support of his petition is misplaced. In *Murphy v. Florida*, *supra*, 421 U.S. 794, this Court had occasion to examine *Sheppard*, *Estes*, and *Rideau* in connection with Murphy's claim that prejudice should be presumed because his prior criminal record was published in the press. This Court rejected the contention on the basis few veniremen were disqualified because they had prejudged the case, the nature of the news stories were not inflammatory, and the seven-month lull in the coverage before trial refuted any presumption of prejudice. (*Murphy v. Florida*, *supra*, 421 U.S. at pp. 802-803.)



In rejecting Murphy's argument, this Court also noted that in each of the cases applying a presumption of prejudice, this Court "overturned a state court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage." (*Murphy v. Florida, supra*, 421 U.S. at p. 798, emphasis added.) Prejudice was presumed because the proceedings were entirely lacking in the solemnity and sobriety to which an accused is entitled. (*Id.*, at p. 799.)

In *Rideau*, the defendant, convicted and sentenced to death for murder, had "confessed" following police interrogation. That 20-minute confession was filmed by a television station and later broadcast three times in the 150,000-person community where the crime and trial took place. (*Rideau v. Louisiana, supra*, 373 U.S. at p. 724; *Murphy v. Florida, supra*, at p. 799.)

In *Sheppard*, both pre-trial and trial proceedings were infected by extensive and extremely inflammatory publicity openly questioning defendant's statements in light of physical evidence. The chief prosecutor and presiding judge were both candidates for upcoming judicial elections. (*Sheppard v. Maxwell, supra*, 384 U.S. at pp. 338-342.) At trial, a substantial portion of the courtroom was reserved for local and out-of-town reporters and the entire courthouse was inundated and ringed by television and radio reporters and equipment. Daily record of the proceedings issued and were broadcast by all the media for the entire nine weeks of the trial. (*Id.*, at pp. 343-344.) In light of the circumstances, this Court observed the trial was infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the

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public appetite for "carnival." (*Sheppard v. Maxwell*, *supra*, 384 U.S. at pp. 345-349; *Murphy v. Florida*, *supra*, 421 U.S. at p. 799.)

Estes was a case of national notoriety in which all pretrial proceedings were carried live on radio and television by a 12-man camera crew which greatly disrupted the proceedings. A "circus atmosphere" prevailed at trial due to the intrusions of the press which was allowed to sit within the bar of the court and to overrun it with television equipment. (*Estes v. Texas*, *supra*, 381 U.S. at pp. 552-557; *Murphy v. Florida*, *supra*, at p. 799.)

In *Murphy*, this Court further observed that none of the presumed prejudice cases stand for the proposition that juror exposure to information about an accused's prior convictions or to news accounts of the crime, by itself,

presumptively deprives the accused of due process. Rather, the presumption applies only where a review of the totality of circumstances demonstrates the accused's trial was fundamentally unfair. (*Murphy v. Florida, supra*, 421 U.S. at p. 799.)

The facts of this case are entirely distinguishable from *Estes*, *Sheppard* and *Rideau*. Unlike those cases, the instant matter was not attended by inflammatory publicity. There was no "carnival" or "circus" atmosphere attached to the trial, nor were there prejudgments of petitioner's guilt by the media or the community from which veniremen were chosen. The discussion concerning which prosecutorial agency would prosecute petitioner first did not inject these factors into the case. Consequently, prejudice should not be presumed.

Finally, even if a presumption of prejudice did apply, certiorari would not

be required in this case. This Court has found presumptions of partiality or prejudice to be rebuttable. (*Patton v. Yount, supra*, 467 U.S. at p. 1035.) Here, any notion of presumed prejudice is overwhelmingly rebutted by the repeated findings that there was no actual prejudice. Each court which has examined the circumstances surrounding petitioner's trial has concluded no actual prejudice resulted from the discussions between the state and federal prosecutors. Consequently, since factual determinations were made that no actual prejudice resulted from those public discussions, no credible basis exists to fabricate a presumption of prejudice from those same facts. Therefore, the writ should be denied.



CONCLUSION

For the foregoing reasons, respondent respectfully requests the Petition for Writ of Certiorari be denied.

Dated: December 13, 1989.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT ALTON HARRIS,

Petitioner,

v.

R. PULLEY, Warden OF THE
CALIFORNIA STATE PRISON AT SAN
QUENTIN, CALIFORNIA,

Respondent.

No. 84-6433

D.C. Nos.

CR 82-0249-E and

CR 82-1005-E

OPINION

Appeal from the United States District Court
for the Southern District of California
William B. Enright, District Judge, Presiding

Argued November 5, 1986—Pasadena, California
Submitted June 29, 1988

Filed July 8, 1988

Before: Arthur L. Alarcon, Melvin Brunetti and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Alarcon



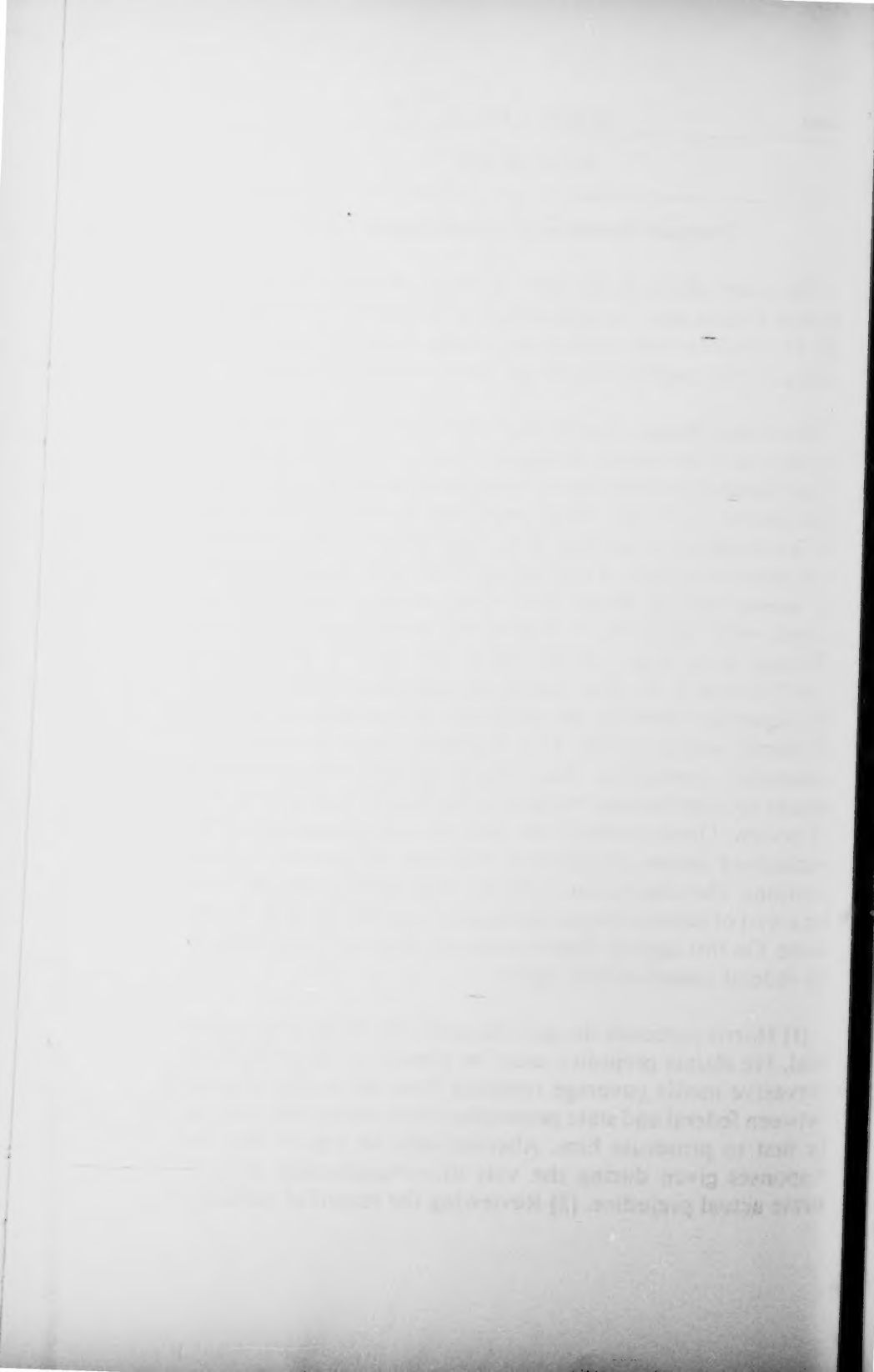
SUMMARY

Criminal Procedure/Constitutional Law

The court affirmed an order denying petitions for writs of habeas corpus and vacated a stay of execution holding that the two murder convictions and death sentence under California's 1977 capital sentencing law are constitutional.

Petitioner Robert Harris was convicted of two counts of murder and sentenced to death. Twice the U.S. Supreme Court denied certiorari concerning his writs of habeas corpus. The district court then denied the first federal petition without an evidentiary hearing. This court issued a stay of execution pending appeal of the denial of the first federal petition for habeas corpus. Harris then filed a second federal habeas corpus writ. In *Harris v. Pulley*, 692 F.2d 1189, this court affirmed as to some of the issues but vacated the district court's denial of the first federal petition because the California Supreme Court did not undertake proportionality review of Harris' sentence. The U.S. Supreme Court reversed and remanded, concluding that California's capital sentencing system is constitutional without a comparative proportionality review. Upon remand, the district court consolidated the unresolved issues contained in the first and second federal petitions. The district court denied the consolidated petitions for a writ of habeas corpus and issued a certificate of probable cause. On this appeal, Harris contends that the State violated his federal constitutional rights.

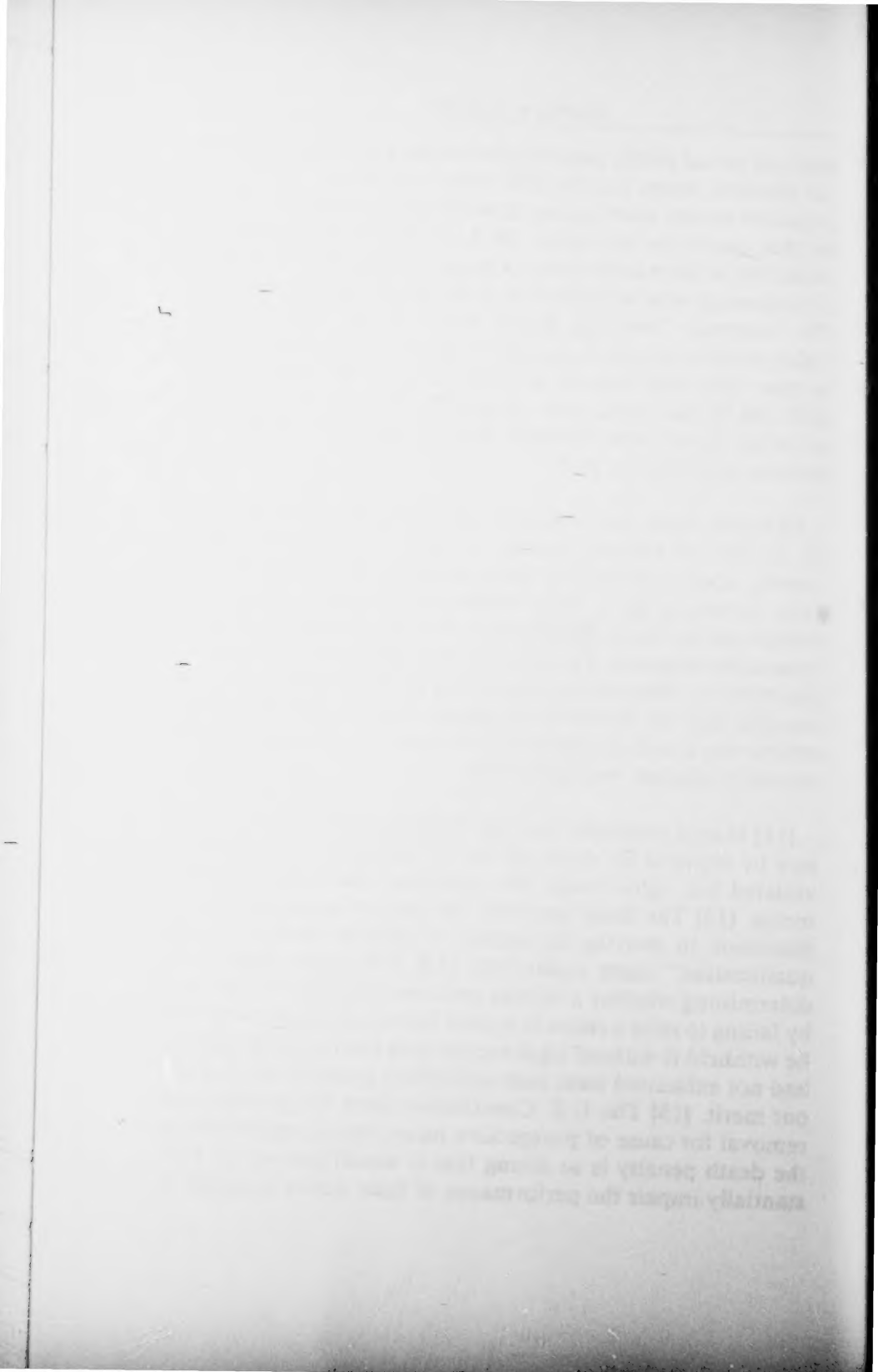
[1] Harris contends the pretrial publicity denied him a fair trial. He claims prejudice must be presumed because of the pervasive media coverage resulting from the public dispute between federal and state prosecutors over which office would be first to prosecute him. Alternatively, he argues that the responses given during the voir dire examination demonstrate actual prejudice. [2] Reviewing the record of publicity



does not reveal public passion warranting a presumption that the selected jurors for the trial were prejudiced. [3] Actual prejudice occurs when jurors show actual partiality or hostility that cannot be laid aside. [4] A key factor in gauging the reliability of juror assurances of impartiality is the percentage of veniremen who will admit to a disqualifying prejudice. [5] The Supreme Court has found that it is not unusual in a highly publicized case to excuse 20 persons from a pool of 78 because they had formed an opinion as to the defendant's guilt. [6] In this case, only 19 persons from a pool of 103 potential jurors were excused because they had formed an opinion as to Harris' guilt.

[7] Under Rule 9(a), a district court may dismiss a petition for a writ of habeas corpus, or separate grounds stated therein, upon a showing of three elements. [8] The three year delay in raising the claim of ineffective assistance of counsel prejudiced the State. [9] However, Harris' counsel acted with reasonable diligence. Thus, the district court did not abuse its discretion in denying the State's 9(a) claim. [10] Because it is possible that the failure to introduce Harris' abnormal EEG results was a tactical decision, this court must presume that counsel's conduct was competent.

[11] Harris contends that the "death-qualification" of the jury by removal for cause of the "*Witherspoon*-excludables" violated his rights under the sixth and fourteenth amendments. [12] The State contends the district court abused its discretion in denying its request to dismiss Harris' "death qualification" claim under 9(b). [13] The proper inquiry in determining whether a habeas petitioner has abused the writ by failing to raise a claim in a prior habeas petition is whether he withheld it without legal excuse. [14] Harris' claim that he had not exhausted state post conviction proceedings is without merit. [15] The U.S. Constitution does not prohibit the removal for cause of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at



the sentencing phase of the trial. [16] The fair cross-section requirement does not apply to petit juries. [17] Even though death qualification in fact produces juries somewhat more conviction prone, the Constitution does not prohibit the States from death qualifying juries in capital cases.

[18] Harris contends the district court erred in denying his requests for discovery and an evidentiary hearing in order to prove his allegations that the California death penalty statute is applied discriminatorily against defendants convicted of murdering whites, and against males between 25 and 34 years of age. [19] The district court permitted Harris to submit updated statistical studies and declarations on his discrimination allegations. It was under no compulsion from this court to hold an evidentiary hearing. [20] An evidentiary hearing would be necessary to hear any evidence that a particular defendant was discriminated against. General statistical studies, however, do not prove discrimination. Moreover, it is not necessary to conduct a full evidentiary hearing as to studies which do nothing more than show an unexplainable disparity. [21] Harris has not demonstrated that the decisionmakers in this case acted with discriminatory purpose on the basis of the race of his two victims, his gender or age. His statistical evidence does not provide exceptionally clear proof that the jury in his case abused its discretion in recommending the sentence of death. [22] The court rejects Harris' contention that the California capital sentencing system is arbitrary and capricious in *application* in violation of the eighth amendment because racial, age and gender considerations may influence capital sentencing decisions in California.

[23] Harris also contends that the death sentence was arbitrarily imposed as a result of the uniquely ambiguous provisions of California's capital sentencing statute because the statute permits arbitrary consideration of a defendant's age as an aggravating factor. [24] The record does not support Harris' claims that the issue of instructional error concerning age

The following table shows the results of the survey conducted in the year 1900. The table is divided into two main sections, the first of which gives the results of the survey of the general population, and the second of which gives the results of the survey of the population of the various counties. The first section is divided into three sub-sections, the first of which gives the results of the survey of the population of the United States, the second of which gives the results of the survey of the population of the various States, and the third of which gives the results of the survey of the population of the various counties. The second section is divided into two sub-sections, the first of which gives the results of the survey of the population of the various counties, and the second of which gives the results of the survey of the population of the various towns. The table is divided into two main sections, the first of which gives the results of the survey of the general population, and the second of which gives the results of the survey of the population of the various counties. The first section is divided into three sub-sections, the first of which gives the results of the survey of the population of the United States, the second of which gives the results of the survey of the population of the various States, and the third of which gives the results of the survey of the population of the various counties. The second section is divided into two sub-sections, the first of which gives the results of the survey of the population of the various counties, and the second of which gives the results of the survey of the population of the various towns.

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discrimination was clearly raised in the first federal habeas corpus petition.

[25] Under California's 1977 capital sentencing statute, a jury is given an instruction in the penalty phase of the trial which contains ten aggravating and mitigating factors it shall consider, take into account and be guided by in deciding whether to impose death or life imprisonment without the possibility of parole. [26] Harris contends the use of these nonstatutory factors violated his federal constitutional rights to due process and the prohibition against cruel and unusual punishment. The State asks that this court declines to review this issue under Rule 9(b). [27] There is no indication in the record that Harris' counsel made a conscious decision deliberately to withhold this contention, to proceed by piecemeal litigation, to vex or harass the court or State, or to delay the proceedings.

COUNSEL

Michael J. McCabe, Attorney at Law, and Charles M. Sevilla, Cleary and Sevilla, San Diego, California, for the petitioner.

John K. Van De Kamp, Attorney-General of the State of California, John W. Carney, Supervising Deputy Attorney General, and Michael D. Wellington, Supervising Deputy Attorney General, San Diego, California, for the respondent.

Julius L. Chambers, James M. Nabrit, III, John Charles Boger, Deval L. Patrick, NAACP, and Anthony G. Amsterdam, New York University School of Law, NAACP, New York, New York; Michael G. Millman and Eric S. Multhaup, California Appellate Project, San Francisco, California, for the *amicus curiae*.

OPINION

ALARCON, Circuit Judge:

Robert Alton Harris (hereinafter Harris) appeals from the denial of his petitions for a writ of habeas corpus challenging the constitutionality of his convictions for two counts of murder and the sentence of death under California's 1977 capital sentencing law.¹

PROCEDURAL HISTORY

On March 6, 1979, a California jury in a bifurcated trial convicted Harris of two counts of murder and sentenced him to death. On February 11, 1981, the California Supreme Court affirmed the convictions and the sentence of death on direct appeal. *People v. Harris*, 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981). On that same date, the California Supreme Court denied Harris' petition for a writ of habeas corpus which had been filed simultaneously with his automatic appeal. The United States Supreme Court denied certiorari. *Harris v. California*, 454 U.S. 882 (1981).

On November 24, 1981, the Superior Court for San Diego County denied Harris' second state petition for a writ of habeas corpus. The California Supreme Court denied review of the petition. On June 7, 1982, the United States Supreme Court denied certiorari. *Harris v. California*, 457 U.S. 1111 (1982).

On March 5, 1982, Harris filed a petition for a writ of

¹Harris was sentenced under the 1977 California death penalty statute, 1 Cal. Stat. 1977, ch. 316, 1255-1266, which was codified at Cal. Penal Code Ann. §§ 190-190.6. The 1977 statute was replaced in late 1978 by the substantially similar provisions now in effect. See Cal. Penal Code Ann. §§ 190-190.7 (West Supp. 1987). Unless otherwise noted, references in this opinion are to the 1977 statute.

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habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of California, No. CV 82-0249 (hereinafter first federal petition). On March 12, 1982, the district court denied the first federal petition without an evidentiary hearing. The district court refused to stay Harris' execution, but issued a certificate of probable cause. On March 12, 1982, we issued a stay of execution pending appeal of the denial of the first federal petition for habeas corpus. While the appeal was pending in this court, Harris filed a second petition for a writ of habeas corpus in the Superior Court for San Diego County on April 16, 1982, which was denied May 4, 1982. On June 30, 1982, the California Supreme Court refused to hear the petition. On August 13, 1982, Harris filed a second petition for a writ of habeas corpus pursuant to section 2254 in the district court, No. CV 82-1005 (hereinafter second federal petition).

In *Harris v. Pulley*, 692 F.2d 1189 (9th Cir. 1982) (per curiam) (hereinafter *Harris I*), we affirmed as to some of the issues but vacated the district court's denial of the first federal petition because the California Supreme Court did not undertake proportionality review of Harris' sentence. *Id.* at 1196-97. We also ordered that "the district court should, if necessary, request and examine all relevant parts of the state court record to determine whether the record supports the state court's findings" on the discrimination and pretrial publicity claims. *Id.* at 1200. As to Harris' discrimination claims, we stated that "if it becomes necessary, [the district court should] provide an opportunity to develop the factual basis and arguments concerning the race-discrimination and gender-discrimination claims." *Id.* at 1197.

The State filed a petition for certiorari presenting the question whether proportionality review is required by the United States Constitution. 460 U.S. 1036 (1983). The United States Supreme Court reversed and remanded, concluding that California's capital sentencing system is constitutional without a

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comparative proportionality review. *Pulley v. Harris*, 465 U.S. 37 (1984).

Upon remand, the district court consolidated the unresolved issues contained in the first and second federal petitions. The issues we remanded to the district court raised in the first federal petition were the prejudicial effect of the pretrial publicity and the discrimination claims based on the race of the victim, and the gender and age of the defendant. In the second federal petition, Harris presented federal constitutional issues regarding (1) "death qualification" of the jury, (2) presentation to the jury of nonstatutory aggravating factors involving the defendant's "character, background, history, mental condition and physical condition," (3) ineffectiveness of counsel at the penalty phase, and (4) denial of due process for failure of the State to grant his post-conviction request for a neurological examination. The district court permitted each party to submit additional briefs and affidavits on the remaining issues. The district court denied the consolidated petitions for a writ of habeas corpus and issued a certificate of probable cause.

On this appeal, Harris contends that the State violated his federal constitutional rights in the following respects:

1. He was denied his right to a fair trial before an impartial jury, and the district court did not permit an evidentiary hearing on this issue, because of the pretrial publicity;

2. He was denied effective assistance of counsel at the penalty phase of his trial under the sixth amendment;

3. He was denied a post-conviction electroencephalogram (hereinafter EEG) examination to prove ineffectiveness of trial counsel in violation of



his due process rights under the fourteenth amendment;

4. He was denied his sixth amendment right to a fair and impartial jury because of the exclusion of jurors opposed to the death penalty;

5. He was denied his right to an evidentiary hearing on his equal protection claims that California's death penalty statute was applied discriminatorily based on the gender and age of the defendant, and race of the victims;

6. He was denied his right to due process because California's capital sentencing statute, Cal. Penal Code § 190.3(h) (1977), permits the arbitrary consideration of a defendant's age as an aggravating factor; and,

7. He was denied his rights under the eighth and fourteenth amendments because of the instructions given to the jury at the penalty phase of the trial.

We address each of these contentions and the facts pertinent thereto under separate headings.

DISCUSSION

I. PRETRIAL PUBLICITY

[1] Harris contends the pretrial publicity denied him a fair trial by an impartial jury in violation of the sixth amendment to the Constitution of the United States. Harris claims prejudice must be presumed in this matter because of the pervasive media coverage resulting from the public dispute between federal and state prosecutors over which office would be first to prosecute Harris. Alternatively, Harris argues that the responses given during the voir dire examination demon-

strate actual prejudice to his right to a fair trial before an impartial jury.

In *Harris I*, we described the nature and scope of the pretrial publicity in this matter as follows:

Pervasive media coverage of Harris and his crimes started with his televised capture for bank robbery. The pretrial publicity apparently included stories that Harris and his brother had confessed to the crimes, that Harris had previously been convicted of manslaughter and that Harris had violated his parole. Numerous editorials and letters to the editor called for the death penalty and a television poll overwhelmingly showed that viewers supported the death penalty in this case. Even the battle between the U.S. Attorney's and District Attorney's offices concerning who would have the first opportunity to prosecute Harris received extensive coverage by the local media for over two weeks. See *People v. Harris*, 28 Cal. 3d at 965-69, 171 Cal. Rptr 679, 623 P.2d 240 (Bird, C. J., dissenting).

692 F.2d at 1199.

A. *Denial of Change of Venue*

Prior to jury selection, Harris made a motion for a change of venue pursuant to Cal. Penal Code Ann. § 1033(a) (West 1985) on the ground that there was a reasonable likelihood that because of extensive publicity, a fair and impartial trial could not be had in the County of San Diego. This pretrial motion was denied. Following voir dire examination of the jury, Harris renewed his motion for a change of venue. The trial court denied the second motion. The California Supreme Court denied Harris' petition for a writ of mandate to compel the trial court to grant a change of venue without opinion.

THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
PUBLISHED WEEKLY
CHICAGO, ILL., U.S.A.

Subscription Price, \$5.00 per Annum in Advance

It is the policy of the Association to publish in this journal only such material as is of interest to the medical profession in general.

Original articles, reports, and communications should be sent to the Editor, J. H. H. H., 535 North Dearborn Street, Chicago, Ill.

Books for review should be sent to the Book Review Editor, J. H. H. H., 535 North Dearborn Street, Chicago, Ill.

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On direct appeal following Harris' conviction, the California Supreme Court reviewed the record and concluded that the state trial judge did not abuse his discretion in denying the motion for a change of venue. California's highest court reasoned that the size of the community dissipated the effect of the pretrial publicity and the voir dire testimony demonstrated no actual prejudice. *Harris*, 28 Cal. 3d at 949-50, 623 P.2d at 247, 171 Cal. Rptr. at 686.

After the California Supreme Court affirmed the judgment and denied his writ of habeas corpus, Harris filed his first federal petition for a writ of habeas corpus in which he claimed, inter alia, that he was denied a fair trial because of pervasive, prejudicial publicity. The district court denied the first federal petition. The record of the district court's proceedings did not reveal whether it had examined "all relevant parts of the state court record" on the question of the effect of pretrial publicity on his right to a fair and impartial jury. *Harris I*, 692 F.2d at 1199. In *Harris I*, we stated on remand that "the district court should, if necessary, request and examine all relevant parts of the state court record to determine whether the record supports the state court's findings." *Id.* at 1200.

On remand, the district court examined the state court record, including the exhibits presented at the motion for a change of venue and the reporter's transcript of the evidentiary hearing on the motion and the voir dire of the jury. The district court ruled (1) the publicity surrounding Harris' case did not warrant a presumption of prejudice and (2) the voir dire of the jury, viewed in light of the passage of time between the commission of the homicides and trial, demonstrated that Harris was not deprived of his right to a fair and impartial jury.

B. *Standard of Review*

"Our duty as a federal court sitting in habeas corpus is to make an independent review of the record to determine

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B. Standard of Review

"Our duty as a federal court is to make an independent review of the facts in the case."

whether there was such a degree of prejudice against the petitioner that a fair trial was impossible." *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984) (citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)). A reviewing court must independently examine the exhibits containing news reports about the case for volume, content, and timing to determine if they were prejudicial. *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1035 (1984); *Murphy v. Florida*, 421 U.S. 794, 802-03 (1975); *Estes v. Texas*, 381 U.S. 532, 536 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 724-25 (1963); *Irvin*, 366 U.S. at 725-26; *Bashor*, 730 F.2d at 1234-35; *United States v. McDonald*, 576 F.2d 1350, 1354 (9th Cir.), *cert. denied sub nom. Besbris v. United States*, 439 U.S. 927 (1978); *United States v. Green*, 554 F.2d 372, 376 (9th Cir. 1977); *United States v. Robinson*, 546 F.2d 309, 311 (9th Cir. 1976), *cert. denied sub nom. Chew v. United States*, 430 U.S. 918 (1977). "Determinations of juror bias are factual determinations to which the presumption of correctness under 28 U.S.C. § 2254(d) applies, although the constitutional standard of jury impartiality is a question of law." *Lincoln v. Sunn*, 807 F.2d 805, 814-15 (9th Cir. 1987) (citations omitted); *Austad v. Risley*, 761 F.2d 1348, 1354 (9th Cir.) (en banc), *cert. denied*, 474 U.S. 856 (1985).

C. *The Standards To Determine the Effect of Prejudicial Pretrial Publicity*

The standards governing a change of venue ultimately derive from the due process clause of the fourteenth amendment which safeguards a defendant's sixth amendment right to be tried by "a panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976). The trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. In such a case, due process requires that the trial court grant defendant's motion for a change of venue. *Rideau*, 373 U.S. at 726. The prejudicial effect of per-

vasive publicity is tested under the presumed prejudice or the actual prejudice standards.

1. The Presumed Prejudice Standard

Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime. *Rideau*, 373 U.S. at 726-27; *Murphy*, 421 U.S. at 798-99; see also *Sheppard v. Maxwell*, 384 U.S. 333, 352-55 (1966). Under such circumstances, it is not necessary to demonstrate actual bias. *Estes*, 381 U.S. at 542-43; *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981) (quoting *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979), cert. denied sub nom. *Lukefahr v. United States*, 444 U.S. 1012 (1980)). The presumed prejudice principle is rarely applicable, *Nebraska Press Ass'n*, 427 U.S. at 554, and is reserved for an "extreme situation." *Mayola*, 623 F.2d at 997.

In *Rideau*, the Supreme Court found the facts concerning the media publicity to be sufficiently extreme to invoke the presumed prejudice rule. *Rideau* confessed to robbing a bank in Calcasieu Parish, kidnapping three of the bank's employees, and killing one of them. 373 U.S. at 723-24. This confession was videotaped and subsequently broadcast three times by a local television station. *Id.* at 724. At the time, Calcasieu Parish had a population of 150,000. *Id.* At trial, the court denied defendant's motion for a change of venue. *Id.* The Supreme Court held that the denial of the motion to change venue violated the due process clause. *Id.* at 726. The Court noted that three jurors who decided the case had seen the televised confession. *Id.* at 725. The Court concluded "without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury" that due process required a trial before a community of persons who had not seen the televised confession. *Id.* at 727. The Court reasoned that the televised confession "was *Rideau's* trial," and "[a]ny



subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id.* at 726 (emphasis in original).

[2] We have independently reviewed the 136 exhibits introduced at the state court hearing on the motion for a change of venue. These exhibits apparently include every media reference to the Harris matter from July 5, 1978, the date of the homicides, until November 30, 1978, the commencement of jury selection. The exhibits reveal that from July 5, 1978 to July 21, 1978, media interest in this case was at its zenith. We conclude that "the record of publicity in the months preceding, and at the time of, the . . . trial does not reveal the 'barage of inflammatory publicity immediately prior to trial' amounting to a 'huge . . . wave of public passion' " to warrant a presumption that the jurors selected for the trial of this matter were prejudiced. *Patton*, 467 U.S. at 1032-33 (citations omitted).

The vast majority of the media accounts are largely factual in nature. *Compare* *Murphy*, 421 U.S. at 802 (pretrial publicity not prejudicial because the news articles concerning the defendant "were . . . largely factual in nature") with *Sheppard*, 384 U.S. at 338-49 (prejudicial media reports were not factual in nature). It is quite true that some of the media reports refer to Harris' prior criminal record, and the alleged confession of each brother. These accounts, however, were published within the two weeks immediately following the homicides. The number of news reports regarding the Harris case had dissipated considerably by the time of jury selection four months later.

Harris also claims "the record of publicity in this case demonstrates repeated acts by state and federal prosecutors releasing inflammatory statements, each publicly vying to outinsure [sic] the other that their jurisdiction would best guarantee appellant's permanent isolation from society." Harris argues that the release of publicity by law enforcement



demonstrates the atmosphere surrounding the trial was so inflammatory as to undermine his right to a fair trial. The record does not support this contention.

Former California Supreme Court Chief Justice Rose Elizabeth Bird, in her dissent in *People v. Harris*, described the public disagreement that occurred between the offices of the United States Attorney and the county district attorney as follows:

About this time, the publicity surrounding this case in San Diego County developed a new aspect, as the two major prosecutorial officers in the county became engaged in a sharp public dispute over which office would "get first crack" at prosecuting appellant. The local United States Attorney's office was responsible for the prosecution of the bank robbery offense, and the county district attorney for the homicides. Each office issued statements indicating what sentence appellant would likely obtain if convicted in its respective court. The United States Attorney claimed that the federal charges were an "insurance policy" against appellant's early release by the parole board. After the district attorney's office responded that it was seeking the death penalty — a punishment not available in the federal courts for bank robbery — the United States Attorney held a televised news conference at which he expressed the opinion that the California death penalty law was unconstitutional.

The district attorney's office took the public position that if the federal charges were tried first, the state might lose the opportunity to try appellant and obtain a death sentence. The district attorney attempted to delay appellant's arraignment in federal court, and members of the office accused the United States Attorney of "political grandstanding."



The United States Attorney responded that it was the county prosecutors who were "grandstanding."

When the federal authorities obtained a trial date of October 3, the *Tribune* noted this "tightens the race between the two jurisdictions as to which will be the first to try the case." An assistant district attorney described the "competition" between his office and the federal prosecutors as an "awkward situation." On August 7, the district attorney was able to have the state trial set on a date earlier than October 3, and the press reported that the district attorney had "moved ahead" in his efforts to "beat federal authorities to the punch in prosecuting the Harris brothers."

Attorneys in the district attorney's office privately told the press that the motivation of the United States Attorney was "politics." They claimed "he is politically ambitious and . . . he knows the case will receive a lot of publicity" The United States Attorney responded that he was merely seeking "maximum protection of the community." Members of the district attorney's office were said to "scoff" at this justification.

On August 10, the *Union* published a lengthy article on the jurisdictional dispute, reporting that a senior federal parole officer "disputed" the United States Attorney's computation of appellant's federal sentence. This official, who calculated a prison term "far under" the term mentioned by the United States Attorney, "cannot understand why [the United States Attorney] is insisting on prosecuting the two brothers from Visalia." County prosecutors were again said to claim that federal involvement was "for the sake of publicity." An assistant legal counsel for the C.R.B. computed for the *Union* that "the

least" appellant would serve in state prison would be a term of years well beyond the term calculated by the federal parole officer.

These events were duly reported by the *Union*, the *Times*, the *Evening Tribune*, and by the local television stations over a two and one-half week period from July 20th through August 10th, and beyond.

28 Cal. 3d at 969-71, 623 P.2d at 259-60, 171 Cal. Rptr. at 698-99.

These facts do not reveal a "general atmosphere in the community or courtroom [which] is sufficiently inflammatory" to deny Harris a fair trial by impartial jurors. *Murphy*, 421 U.S. at 802. The dispute between the two prosecutorial branches focused on the merits of each criminal system in the context of this particular case; the publicized dispute did not involve a prejudgment by either office as to the guilt of Harris which existed in *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), relied upon by Harris. Similarly, the disagreement was relatively short-lived, only spanning a brief two and one-half week period in the early part of the four-month period between the homicides and the voir dire of the jury. Under the "totality of circumstances," *Murphy*, 421 U.S. at 799; *Patton*, 467 U.S. at 1031, the public dispute between the federal and local prosecution does not warrant a finding of community prejudice sufficiently inflammatory to deny Harris a fair trial.

2. Actual Prejudice

[3] To determine whether actual prejudice existed to deny defendant his right to "a panel of impartial, 'indifferent' jurors," *Irvin*, 366 U.S. at 722, a court must determine if the jurors demonstrated actual partiality or hostility that could not be laid aside. *Murphy*, 421 U.S. at 800. "[J]urors need not, however, be totally ignorant of the facts and issues

involved." *Id.* The Court in *Irvin* defined the constitutional level of impartiality required to ensure a fair trial:

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

366 U.S. at 723.

[4] Harris claims the responses of the jurors on voir dire revealed actual prejudice because 79% (81 of 103) of the prospective jurors questioned and 75% (9 of 12) of the petit jury were exposed to pretrial publicity. We disagree. Actual prejudice is not demonstrated by a showing of exposure to pretrial publicity. "The relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton*, 467 U.S. at 1035 (citing *Irvin*, 366 U.S. at 723). The Supreme Court has indicated that a key factor in gauging the reliability of juror assurances of impartiality is the percentage of veniremen who "will admit to a disqualifying prejudice." *Murphy*, 421 U.S. at 803. The higher the percentage of veniremen admitting to a previously formed opinion on the case, the greater the concern over the reliability of the voir dire responses from the remaining potential jurors. *Id.*

[5] In *Murphy*, the Supreme Court found that it was not unusual in a highly publicized case to excuse 20 persons from a pool of 78 because they had formed an opinion as to the defendant's guilt. *Id.* at 803. Thus, no inference of actual prejudice could be drawn regarding the reliability of assurances of impartiality obtained from the remaining jurors. *Id.*

[6] In the instant case, the voir dire examination was conducted by the trial judge and counsel for both parties. It was very thorough and probing into any potential bias exhibited against Harris or knowledge about the case. Any juror who revealed exposure to prejudicial publicity was excused from the case by the court even without a showing that he had formed an opinion as to Harris' guilt. Only 19 persons from a pool of 103 potential jurors were excused because they had formed an opinion as to Harris' guilt. This constitutes an even lower percentage (18%) than was found acceptable in *Murphy* (26%). By contrast, in *Irvin*, where the reliability of juror assurances of impartiality was successfully challenged, almost 90% of the veniremen (370 of 430) entertained some opinion as to the defendant's guilt, including 8 of the 12 jurors finally placed in the jury box. 366 U.S. at 727.

The responses given by the jurors who were sworn to try this matter demonstrate their impartiality.² Three jurors had virtually no information about the case. None of the seated jurors indicated they held any preconceived notions regarding Harris' guilt. No actual prejudice to Harris' right to a fair and impartial jury is demonstrated in the voir dire examination.

D. *Discussions In Jury Lounge*

Harris claims that "hostile" and "intense" discussions in the jury lounge demonstrate actual or presumed prejudice and an impartial jury. While the individual voir dire examination was being conducted in the courtroom, prospective jurors waiting to be interviewed remained in the Jury Commissioner's Office. In the same room were persons summoned as prospective jurors in other criminal and civil matters.

²The voir dire in this case was extensive. It took 13 days to pick 16 jurors from 104 venire persons. See *Patton*, 467 U.S. at 1034 n.10 (it took 10 days to pick 14 jurors from 292 venire persons); *Irvin*, 366 U.S. 717 (it took 8 days to pick 14 jurors from 430 venire persons).

The trial judge admonished all the jurors in this matter not to discuss the case with anyone. On the eighth day of jury voir dire, after 64 jurors had been examined, a juror stated during voir dire that prospective jurors and jurors not involved in the Harris matter were discussing this case. After examining the juror further, the trial judge observed that "all [64] jurors who have been questioned have been frank and honest and we have been getting the benefit of what they really know." Harris' counsel concurred in the court's assessment. Pursuant to Harris' counsel's suggestion, the court admonished the remaining 18 jurors to avoid any discussions in the jury lounge concerning the case.³ This special cautionary instruction and the extensive and searching voir dire examination of the jury conducted by the court and counsel eliminated any potential for prejudice arising from the jury lounge discussions about the case.

Harris' characterization of the jury lounge discussions as "hostile" and "intense" is not supported by the record. Only two of the jurors who served on the petit jury overheard the discussions in the jury lounge. Juror LaValley walked away when he heard a prospective juror mention the Harris trial. Juror Earl only heard that Harris was accused of murder.

³THE COURT: Ladies and gentlemen, I have called you in because we know that the facilities down in the jury room are not too good. I am talking about the Jury Commissioner's office.

There is too much possibility of discussion on the part of those who are not involved in this case concerning this case, and I would ask that you please be very careful in your discussions with anybody, as I have told you during all of these admonitions, and to certainly avoid any discussion that comes from someone who is not involved. I am talking about jurors who are down there for other cases and who might volunteer information to you and so on.

If any incident does occur in which you are involved in conversation, someone is to involve you about this case, I want you to be sure and call it to the attention of the Court.

Now, we are going to go forward with our voir dire.



Harris' trial counsel thoroughly examined both jurors. The jurors' responses did not disclose any bias against Harris. These prospective jurors not selected to serve in this matter who overheard the lounge discussions did not express any hostility or bias toward Harris.

The state trial judge concluded that the responses to the voir dire examination did not demonstrate that there was a reasonable likelihood that the jurors selected to sit on the petit jury could not provide Harris with a fair and impartial determination of the facts. The judge expressed his assessment of this issue in the following language:

I was impressed with the forthrightness of the jurors. I think the fact that they were interviewed individually and questioned individually even increases the desire on the part of the juror to tell us precisely what their feelings were I saw nothing . . . in the examination to indicate to me that the jury or in any sense there was a feeling of hostility, that there was antagonism, that there was a knowledge so great as to create an atmosphere that would not allow for a fair trial. As a matter of fact, I think the reverse is true. I am satisfied that the jury that has been selected was very fairly selected.

A state trial court's findings of fact with respect to the prejudicial effect of pretrial publicity are presumed to be correct, 28 U.S.C. § 2254(d); *Chaney v. Lewis*, 801 F.2d 1191, 1194 (9th Cir. 1986), cert. denied, 107 S. Ct. 1911 (1987); *Austad*, 761 F.2d at 1354, and will not be set aside unless the error is manifest. *Irvin*, 366 U.S. at 724; *Patton*, 467 U.S. at 1031-32 & n.7 (applying the "manifest error" standard of *Irvin*). Our independent review of the record amply supports the state trial court's findings that the persons selected as petit jurors were not prejudiced against Harris as the result of the media publicity in this matter. Thus, Harris was not deprived of his right to an impartial jury.

II. EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Harris contends he was denied effective assistance of counsel at the penalty phase of his trial because his trial counsel failed (1) to present the abnormal results of his 1971 EEG examination as mitigating evidence and (2) to request a third EEG examination. The State contends that we should not reach the merits of Harris' ineffectiveness of counsel claim under Rule 9 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254 (1982). We first address the State's Rule 9 claims.

A. *Rule 9(a)*

In the district court, the State claimed the court should dismiss Harris' ineffective assistance of counsel claim under Rule 9(a) because it was prejudiced by Harris' four-year delay in asserting this claim. The State claims it was prejudiced by Harris' delay in raising the issue of ineffective assistance of counsel because "in the four years between Harris' conviction and the 'discovery' by present counsel of this issue, the principal witness (trial counsel) has become unable to remember whether he considered introducing such evidence at the penalty phase." Harris' trial counsel, Thomas J. Ryan, stated in his declaration in support of this contention of ineffectiveness of counsel, "I did not introduce the abnormal EEG as evidence at the penalty trial. I do not recall that I considered doing so." Because the district court reached the merits of the ineffectiveness of counsel claim and did not address the State's Rule 9(a) claim, we can only conclude that the district court impliedly rejected the State's claim of prejudice.

[7] Rule 9(a) provides:

A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by

delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Under Rule 9(a), a district court may dismiss a petition for a writ of habeas corpus, or separate grounds stated therein, upon a showing that (1) the state has been prejudiced in its ability to respond to the petition, (2) this prejudice resulted from petitioner's delay, and (3) the petitioner has not acted with reasonable diligence as a matter of law. *Brown v. Maggio*, 730 F.2d 293, 295 (5th Cir. 1984) (per curiam). The burden of proof initially lies with the state:

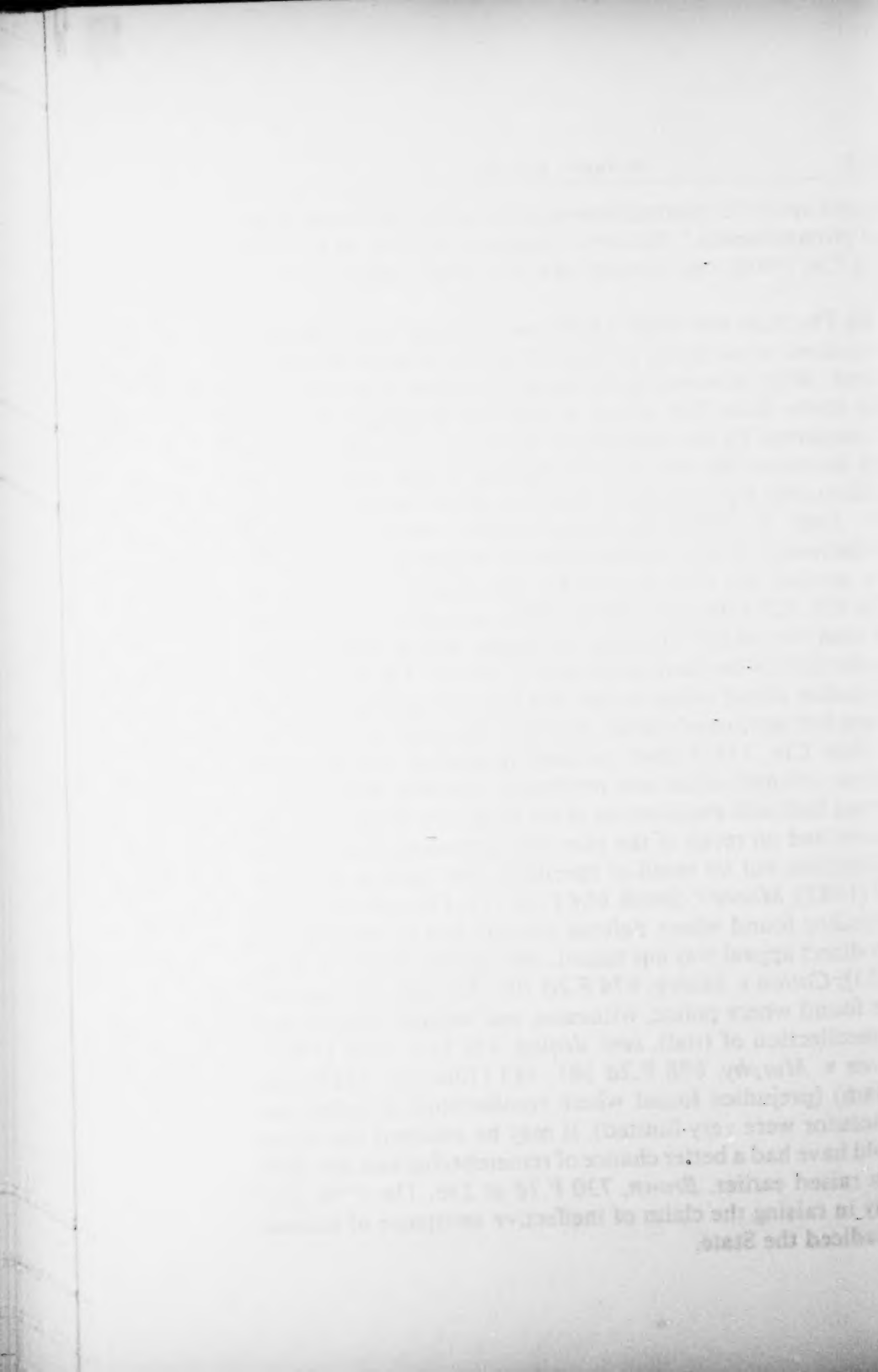
If the State makes a prima facie showing that it has been prejudiced as a result of the petitioner's delay, the burden shifts to the petitioner to show either that the state actually is not prejudiced or that petitioner's delay "is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

McDonnell v. Estelle, 666 F.2d 246, 251 (5th Cir. 1982) (quoting Rule 9(a)); *Brown*, 730 F.2d at 295.

The state is prejudiced if the delay forecloses its ability to rebut the petitioner's allegations. Rule 9(a); *Brown*, 730 F.2d at 295. "'[D]elay alone is no bar to federal habeas relief" In order to prevail on a laches claim respondent must make a particularized showing of prejudice" caused by the delay. *Paprskar v. Estelle*, 612 F.2d 1003, 1007-08 (5th Cir.) (citations omitted) (quoting *United States ex rel. Barksdale v. Blackburn*, 610 F.2d 253, 260 (5th Cir. 1980), cert. denied, 454 U.S. 1056, (1981)), cert. denied, 449 U.S. 885 (1980)); *McDonnell*, 666 F.2d at 251; Rule 9(a). The ultimate disposition of whether the petitioner used reasonable diligence is

"based upon the reasonableness of the party's behavior under the circumstances." *Baxter v. Estelle*, 614 F.2d 1030, 1034 (5th Cir. 1980), *cert. denied*, 449 U.S. 1085 (1981).

[8] The State has made a sufficient showing that it has been prejudiced in its ability to respond to the petition because of Harris' delay in asserting the claim. Courts have found prejudice under Rule 9(a) where a delay in bringing a claim is accompanied by the inability of a witness to recall information necessary for the state to respond to the merits of the petition. *See, e.g., Mayola v. Alabama*, 623 F.2d 992, 999 (5th Cir. Unit A 1980) (prejudice found where there was "impairment of the recollections of numerous witnesses"), *cert. denied*, 451 U.S. 913 (1981); *Bouchillon v. Estelle*, 628 F.2d 926, 929 (5th Cir. Unit A 1980) (prejudice found where "at least two of the witnesses no longer had an independent recollection of the facts of the trial"); *Brown*, 730 F.2d at 295 (prejudice found where judge and defense attorney did not remember petitioner's plea); *Arnold v. Marshall*, 657 F.2d 83, 84 (6th Cir. 1981) (*per curiam*) (prejudice found where defense counsel could not remember specifics of the issue, witness had little recollection of the facts, two of the arresting officers had no recall of the case, and prosecutor had general recollection but no recall of specifics), *cert. denied*, 455 U.S. 922 (1982); *Moore v. Smith*, 694 F.2d 115, 118 (6th Cir. 1982) (prejudice found where defense counsel had no recollection why direct appeal was not taken), *cert. denied*, 460 U.S. 1044 (1983); *Cotton v. Mabry*, 674 F.2d 701, 705 (8th Cir.) (prejudice found where police, witnesses, and defense counsel had no recollection of trial), *cert. denied*, 459 U.S. 1015 (1982); *Bowen v. Murphy*, 698 F.2d 381, 383 (10th Cir. 1983) (*per curiam*) (prejudice found where recollections of judge and prosecutor were very limited). It may be assumed that Ryan would have had a better chance of remembering had this issue been raised earlier. *Brown*, 730 F.2d at 296. The three year delay in raising the claim of ineffective assistance of counsel prejudiced the State.



The next inquiry under Rule 9(a) is whether Harris can demonstrate that he acted with diligence as a matter of law. The State claims that both Harris and his current counsel were not reasonably diligent in proffering this claim. The evidence supports a contrary conclusion.

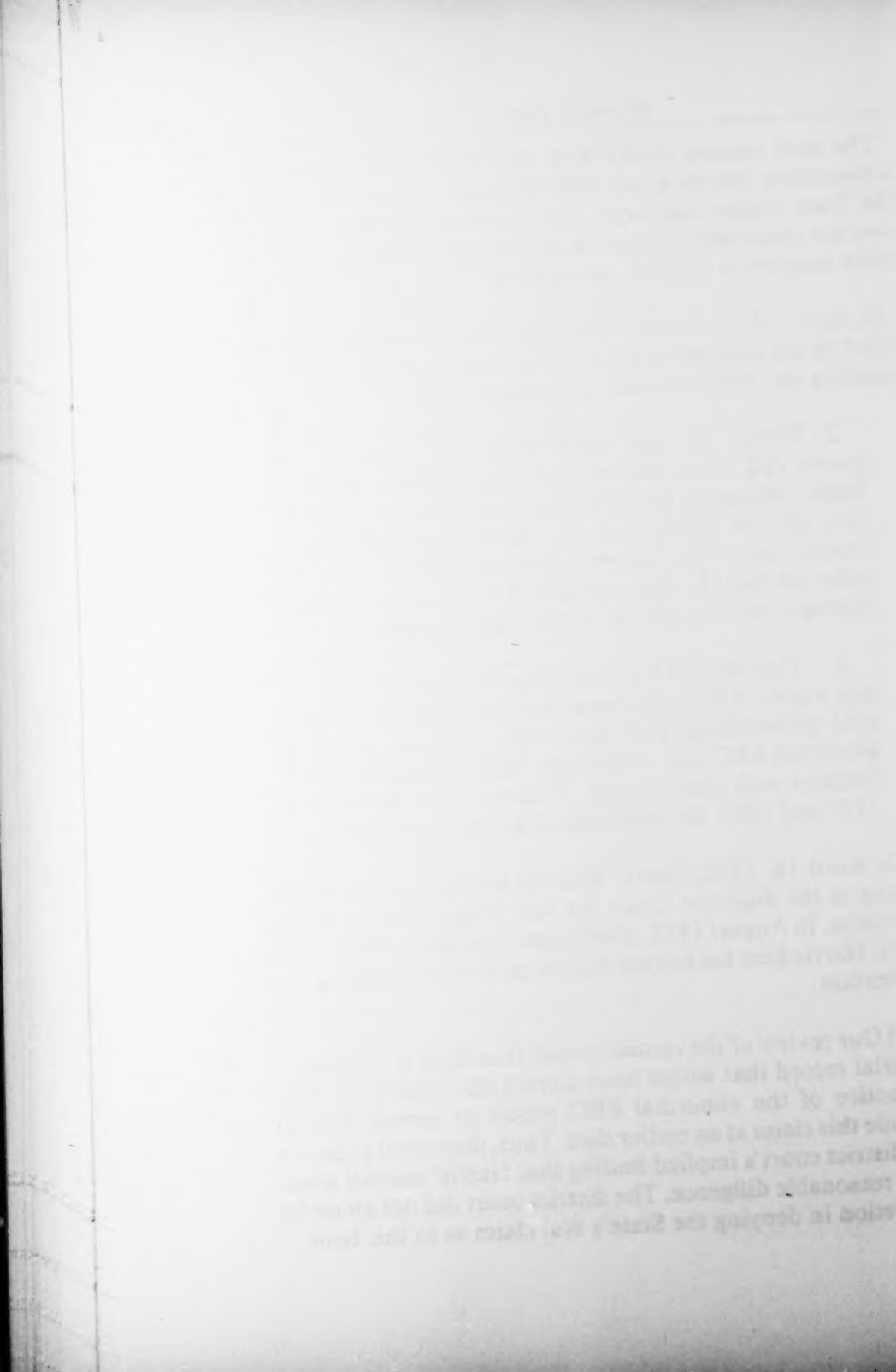
In April 1982, Michael J. McCabe, Harris' current counsel, stated in his declaration as to the discovery of the facts surrounding the ineffectiveness of counsel claim:

2. Within the past three months, I received a phone call from federal probation officer, Steven Blake, informing me that upon review of his probation file he discovered an electroencephalogram report from Springfield, Missouri. The report reflected that Mr. Harris suffered from organic brain damage, possibly due to chronic glue-sniffing.

3. This was the first time I had been informed of this report. I fully reviewed the court record of the trial proceedings and found no reference to an abnormal EEG test. Although I had numerous conferences with trial counsel, Thomas Ryan, between 1979 and 1982, the abnormal EEG was never raised.

On April 16, 1982, Harris filed his second writ of habeas corpus in the Superior Court for San Diego County raising this claim. In August 1982, after exhausting this claim in state court, Harris filed his second federal petition containing this contention.

[9] Our review of the record reveals that there is nothing in the trial record that would have alerted McCabe or put him on notice of the abnormal EEG report to permit him to include this claim at an earlier date. Thus, the record supports the district court's implied finding that Harris' counsel acted with reasonable diligence. The district court did not abuse its discretion in denying the State's 9(a) claim as to this issue.



B. Rule 9(b)

The State next claims that Harris' failure to assert the ineffective assistance of counsel claim in his first petition is an abuse of the writ under Rule 9(b) of the Rules Governing Section 2254 cases, 28 U.S.C. foll. § 2254. Rule 9(b) provides in pertinent part: "A second or successive petition may be dismissed if . . . new and different grounds are alleged, [and] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

The State argues for the first time on appeal that even if McCabe did not discover the factual underpinnings of the ineffectiveness of counsel claim in time to include it in Harris' first federal petition, the filing of a second federal petition was an abuse of the writ because Harris was aware of the facts upon which the new issues are premised. We do not reach this question because the State did not present this argument to the district court for consideration.

C. Ineffective Assistance Of Counsel

Harris claims his trial counsel's failure to present evidence at the penalty phase of his trial of the 1971 abnormal EEG examination results, and to request an EEG examination at trial constitute ineffective assistance of counsel. The facts do not support this conclusion.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth the test under which we review claims of ineffective assistance of counsel in capital cases. A petitioner must show both that counsel's performance "fell below an objective standard of reasonableness" considering "all the circumstances," *id.* at 688, and that "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circum-

stances did not warrant death," *id.* at 695. The Court noted that

[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Thus, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700. The district court applied the *Strickland* standard and concluded Harris had not demonstrated deficient performance by trial counsel or prejudice.

Harris' trial counsel was aware of the abnormal 1971 EEG showing abnormal results at the *guilt* phase of Harris' trial. He was also aware of a subsequent EEG performed in 1977, only two years before the homicides, which demonstrated *normal* results. Harris' counsel explained that he decided not to use the 1971 EEG results during the guilt phase of Harris' trial because it would have been inconsistent with Harris' alibi defense. He also states that "I did not introduce the abnormal EEG as evidence at the penalty trial. I do not recall that I considered doing so."

[10] These declarations do not overcome the "strong presumption" that Harris' counsel's failure to introduce the 1971 EEG results or to request a third EEG examination fell within "the wide range of reasonable professional assistance . . ." *Strickland*, 466 U.S. at 689. We do not know from this record whether trial counsel concluded that the fact that the most recent EEG was normal might have been harm-

ful to a claim of mitigation based on mental impairment. Because it is possible that the failure to introduce the abnormal EEG results was a difficult but thoughtful tactical decision, we must presume that counsel's conduct was within the range of competency. Because Harris has failed to demonstrate deficient performance, the ineffective assistance of counsel claim must fail.

III. DENIAL OF A POST-CONVICTION EEG EXAMINATION

Harris contends the State of California's denial of his request for a post-conviction EEG examination was arbitrary and violated his right to due process under the fourteenth amendment. Because the State's action did not affect Harris' right to due process at his trial and sentencing, we must reject this argument.

In Harris' June 1982 "Application for Order Permitting a Neurological Examination of Petitioner at San Quentin, etc." filed in the California Supreme Court, Harris' counsel applied for an order permitting an EEG examination of petitioner "to enable petitioner to gather evidence to support his claim of ineffective assistance of trial counsel for failure to move for a pretrial neurological examination to confirm petitioner's organic brain damage." The state supreme court denied the request.

The record does not demonstrate that an EEG examination performed in 1982 would establish Harris' mental condition at the time of trial in 1979, or that it would aid a reviewing court in evaluating whether trial counsel's performance fell below an objective standard of reasonableness. See *Strickland*, 466 U.S. at 689. Thus, the California Supreme Court's decision to deny Harris' request for a post-conviction EEG examination was not arbitrary or violative of due process.



IV. "DEATH QUALIFICATION" OF THE JURY

[11] The state trial judge removed for cause, over Harris' objections, prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty pursuant to *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Harris contends that the "death-qualification" of the jury by removal for cause of the "*Witherspoon*-excludables" violated his rights under the sixth and fourteenth amendments to the United States Constitution because (1) the resulting jury is prone to convict, (2) it does not constitute a neutral or reliable tribunal, and (3) it does not represent a fair cross-section of the community. The district court rejected this claim and denied Harris an evidentiary hearing on this issue.⁴ We initially address the State's assertion that Harris abused the writ under Rule 9(b).

A. Abuse of the Writ

[12] The State contends the district court abused its discretion in denying its request to dismiss Harris' "death qualification" claim under Rule 9(b) because (1) this argument was raised and rejected in his first federal petition, and (2) assuming this argument is new, there is no reason for it not to have been presented in the first petition. Rule 9(b) bars successive petitions where new grounds are alleged and the court

⁴After Harris filed a notice of appeal to challenge this ruling, he moved this court on November 12, 1985, to recalendar oral argument in this case pending the decision of the Supreme Court in *Lockhart v. McCree*. *Lockhart* involved the issue of the "death qualification" of a jury. On January 16, 1986, this court vacated the setting of oral argument pending the Supreme Court's decision in *Lockhart v. McCree*. On May 5, 1986, the Supreme Court decided *Lockhart v. McCree*, 476 U.S. 162 (1986). Harris' case was recalendared for oral argument to November 5, 1986.

Both parties have filed supplemental briefs addressing the applicability of *Lockhart*. The NAACP Defense and Educational Fund, Inc. filed an *amicus curiae* brief devoted solely to the "death qualification" issue in support of Harris' contentions.



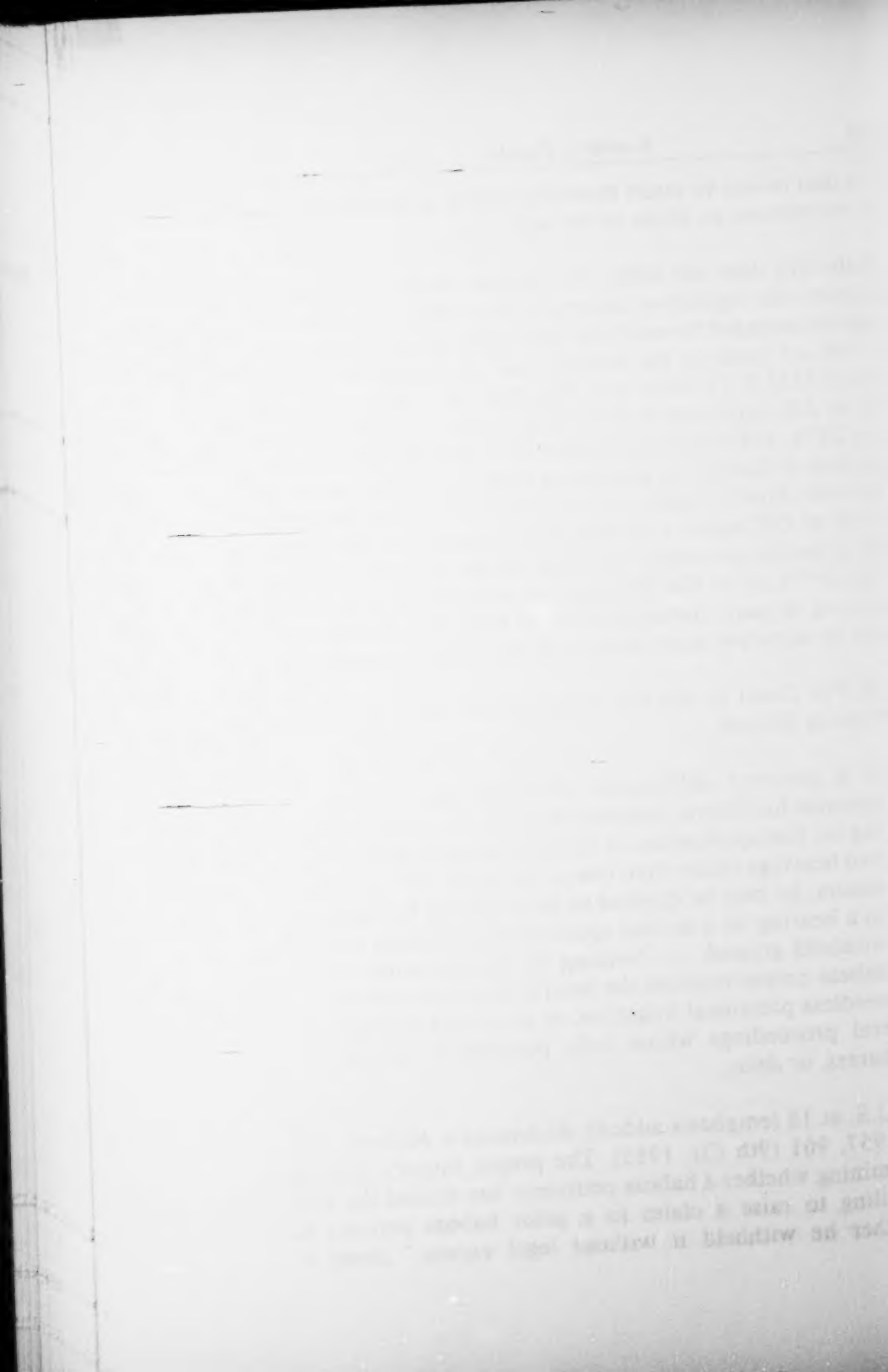
finds that failure to assert these arguments in the earlier petition constitutes an abuse of the writ.

Rule 9(b) does not define the phrase "abuse of the writ." However, the legislative history of Rule 9(b) indicates that Congress intended to codify the principles governing abuse of the writ set forth in the leading case of *Sanders v. United States*, 373 U.S. 1 (1963). H.R. Rep. No. 1471, 94th Cong., 2d Sess. at 5-6, reprinted in 1976 U.S. Code Cong. & Admin. News 2478, 2482 (quoting *Sanders*, 373 U.S. at 17). Thus, we must look to *Sanders* to determine what constitutes an abuse of the writ. *Rose v. Lundy*, 455 U.S. 509, 521 (1982) (plurality opinion of O'Connor, J.) ("Rule 9(b) incorporates the judge-made principle governing the abuse of the writ test set forth in *Sanders*"); *id.* at 534 (Brennan, J., concurring in part and dissenting in part) (interpretation of Rule 9(b) "necessarily entails an accurate interpretation of the *Sanders* standard").

[13] The Court in *Sanders* discussed the abuse of the writ doctrine as follows:

if a prisoner *deliberately withholds* one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. . . . Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. at 18 (emphasis added); *Richmond v. Ricketts*, 774 F.2d 957, 961 (9th Cir. 1985). The proper inquiry then in determining whether a habeas petitioner has abused the writ by failing to raise a claim in a prior habeas petition is "whether he withheld it without legal excuse." *Jones v.*



Estelle, 722 F.2d 159, 163 (5th Cir. 1983) (en banc), *cert. denied sub nom. Jones v. McKaskle*, 466 U.S. 976 (1984). Legal excuse is demonstrated when, for example, new facts have arisen since the prior petition which were not reasonably ascertainable at the time of the filing of the earlier petition, or the law has changed in some substantive manner in the interim. *Id.* at 165, 169.

In rejecting the State's Rule 9(b) claim, the district court stated:

Harris' contention that death qualified juries do not represent a fair cross section of the community was presented in his first petition and rejected by this court. *Petition I*, 82-0249 at 93-95. The other two prongs of the death qualification argument were not exhausted at the state level when Harris filed his first petition in March 1982. Harris risked dismissal of his entire petition had he included unexhausted claims with exhausted arguments. *Rose v. Lundy*, 455 U.S. 509 (1982); *Powell v. Spaulding*, 679 F.2d 163, 166, n.2 (9th Cir. 1982).

We review *de novo* whether a claim was exhausted in state court. *Kim v. Villalobos*, 799 F.2d 1317, 1320 (9th Cir. 1986). "A state prisoner seeking federal habeas corpus review of his conviction ordinarily must first exhaust available state remedies." *Id.* at 1319; 28 U.S.C. § 2254(b), (c).

[14] Our independent review of the record reveals the district court's conclusion is not supported by the record. Harris had exhausted his state remedies as to *all* three prongs of his "death qualification" argument when the California Supreme Court denied his petition for a writ of habeas corpus on October 10, 1980, prior to the filing of his federal petition on March 5, 1982. Harris' state petition raised all three prongs:

The excusal for cause of jurors who, while unalterably opposed to the imposition of the death penalty,

The present (10 years of study) was designed to investigate the effects of

Stress (1983) Stress was defined as a state of tension or strain resulting from an external stimulus which is perceived as a threat to the individual's well-being. The term 'stress' is used in a broad sense to cover all types of stressors, both physical and psychological. The term 'stressor' refers to any agent or condition which is capable of producing a stress response. The term 'stress response' refers to the physiological and psychological changes which occur in response to a stressor. The term 'stress reaction' refers to the behavioural changes which occur in response to a stressor. The term 'stressor' is used to refer to the external agent or condition which is capable of producing a stress response. The term 'stress response' is used to refer to the physiological and psychological changes which occur in response to a stressor. The term 'stress reaction' is used to refer to the behavioural changes which occur in response to a stressor.

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can nevertheless fairly determine the guilt or innocence of the defendant, denied petitioner a fair trial by an impartial jury on the issues of his guilt or innocence, the degree of his offense if guilty, and the truth or untruth of the special circumstances alleged. The process of excluding prospective jurors for cause based on opposition to the death penalty (i.e., "death qualification") in a situation where, as here, a single jury heard both the guilt and penalty phases of petitioner's bifurcated trial renders that jury impermissibly prosecution-prone, more likely to convict than a jury which is properly representative of a cross-section of the community and incapable of functioning as an impartial and effective safeguard of petitioner's rights guaranteed by state and federal constitutional provisions.

Thus, Harris' claim that he had not exhausted state post conviction proceedings on this issue is without merit.

Alternatively, Harris asserts that he did not abuse the writ under Rule (b) because he has acquired "newly developed scientific evidence" on the death qualification issue which was not available when he filed his first federal petition. This argument is supported by the record.

In Harris' first state petition for a writ of habeas corpus filed concurrently with his automatic appeal to the California Supreme Court, Harris incorporated the statistical evidence proffered in *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980), a capital case then pending in the California Supreme Court, with his death qualification claim. One of the reasons the California Supreme Court rejected Harris' "death qualification" claim was that the statistical evidence he relied upon did not take into "consider[ation] the differences between a 'Witherspoon-qualified' jury and a 'California death-qualified' jury." *Hovey*, 28 Cal. 3d at 69, 616 P.2d at 1346, 168 Cal. Rptr. at 174; see

Harris, 28 Cal. 3d at 960, 623 P.2d at 253, 171 Cal. Rptr. at 692-93 (*Harris*' death qualification claim was based on *Hovey*). *Harris* explains that after he filed his first federal petition on March 5, 1982, his attorney McCabe became aware of new statistical evidence presented in the capital case *People v. Word and Sparks*, S.F. No. 14376, on this issue. *Harris* asserts that the "newly developed scientific evidence" presented during the *Word and Sparks* proceedings takes into consideration the "California death-qualified" jury. The State has not offered evidence that this material was not "newly developed." Because of *Harris*' showing that he has discovered evidence not reasonably ascertainable at the time of his first federal petition, the district court did not abuse its discretion in rejecting the State's Rule 9(b) abuse of the writ claim.

B. *Propriety of Exclusion of "Witherspoon-excludables" from the Petit Jury*

[15] In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Supreme Court held that the United States Constitution does not "prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial." *Id.* at 165. The Court rejected the defendant's contention that "death qualification" of the jury violated his right under the sixth and fourteenth amendments to an impartial jury selected from a representative cross section of the community. *Id.* at 173-77, 183-84. *Harris* has advanced many of the same arguments the Supreme Court expressly rejected in *McCree*.

As the Supreme Court recently noted, "[t]here is no reason to revisit the issue whether social-science literature conclusively shows that 'death-qualified' juries are 'conviction-prone.'" *Buchanan v. Kentucky*, 483 U.S. ___, 107 S. Ct. 2906, 2913 n.16 (1987). Just as it was assumed in *McCree* and



Buchanan that the studies presented in those cases were "both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries," *McCree*, 476 U.S. at 173; *Buchanan*, 107 S. Ct. at 2913 n.16, we make a similar assumption here concerning similar studies presented by Harris.

[16] The Supreme Court's reasoning in *McCree* requires rejection of Harris' contention that "death qualification" violated his right to a jury selected from a representative cross-section of the community. The fair cross-section requirement does not apply to petit juries. The fair cross-section rule is limited to the method of summoning the venire panel from which the petit jury is selected. *McCree*, 476 U.S. at 173-74. No violation of the sixth amendment's fair cross-section requirement has been shown in this matter.

[17] The analysis in *McCree* also forecloses Harris' claim that the removal of "*Witherspoon*-excludables" resulted in the selection of a conviction-prone jury. The Court in *McCree* stated that even though " 'death qualification' in fact produces juries somewhat more 'conviction prone' than 'non-death-qualified' juries. . . . the Constitution does not prohibit the States from 'death qualifying' juries in capital cases." 476 U.S. at 173.

Harris finally claims that "death qualification" denied him a "jury capable of fulfilling functions contemplated by the right to a jury trial." Harris asserts that "death qualification" results in a jury which is "less likely to overcome the biases of its members or to arrive at an accurate and objective result through the counterbalancing of the prejudices and proclivities of individual jurors." This argument is merely a restatement of Harris' fair cross-section argument. *Accord Smith v. Balkcom*, 660 F.2d 573, 584 & n.29 (5th Cir. Unit B 1981) (defendant's claim that "death qualification" denies him his right to a properly functioning jury is "simply another way of



claiming that the jury which convicted him was not fairly representative of the community"), *modified*, 671 F.2d 858 (1982) (*per curiam*).

V. DISCRIMINATORY APPLICATION OF THE DEATH PENALTY

[18] Harris contends the district court erred in denying his requests for discovery and an evidentiary hearing in order to prove his allegations that the California death penalty statute violates his right to equal protection under the fourteenth amendment and the eighth amendment prohibition against cruel and unusual punishment because it is applied discriminatorily against defendants convicted of murdering whites, and against males between 25 and 34 years of age.

A. District Court's Compliance With This Court's Prior Decision

Harris initially contends that this court ordered the district court to conduct an evidentiary hearing upon remand in *Harris I*. Harris misconstrues our prior opinion. In our prior opinion, we stated in reference to Harris' discrimination claims:

We do not believe that the State accorded Harris a full and fair hearing on these constitutional claims. Although we do not decide whether Harris has a right to a hearing in federal court under *Pierce* [*v. Cardwell*, 572 F.2d 1339, 1340-41 (9th Cir. 1978)], we believe that the district court should, if it becomes necessary, provide an opportunity to develop the factual basis and arguments concerning the race-discrimination and gender-discrimination claims.

692 F.2d at 1197. We also held that Harris' conclusory allegations in his age discrimination claim were insufficient "to

obtain a hearing in federal court. . . . absent some stronger showing." *Id.* at 1199.

[19] Our order that an opportunity to develop the evidence "if it becomes necessary," left the decision to the district court whether an evidentiary hearing would be required. *See Shaw v. Martin*, 733 F.2d 304, 313 (4th Cir.) (defendant was not entitled to an evidentiary hearing on his contention that South Carolina's death penalty statute was discriminatorily applied because "[t]he proffered evidence would not have been of sufficient probative value on the issue of discriminatory intent to have required response, and no evidentiary hearing was therefore required") (citing *United States v. Duncan*, 598 F.2d 839, 869 (4th Cir.), *cert. denied*, 444 U.S. 871 (1979)), *cert. denied*, 469 U.S. 873 (1984). The district court, on remand, permitted Harris to submit updated statistical studies and declarations on his discrimination allegations. It was under no compulsion from this court to hold an evidentiary hearing.

B. Denial of the Request for Discovery and an Evidentiary Hearing

Harris moved for discovery under Rule 6(a) of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254 (1982). Rule 6(a) provides for discovery in habeas corpus proceedings "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Harris' request for discovery was made in conjunction with his request for an evidentiary hearing on his discrimination claims.

In his discovery motion, Harris presented statistical data analyzed by Dr. James Cole "refer[ring] to convictions and death sentences stemming from homicides occurring in California in years 1978-1982." Cole's preliminary findings indicate that "someone whose victim was white had a probability of ultimately receiving the death penalty approximately five



times as large as that for someone whose victim was nonwhite." Further, a male between the ages of 25 to 34 stands a significantly greater chance than other defendants of receiving the sentence of death. Based on these preliminary findings, Harris moved for an order compelling the State to produce substantial data from the California courts, including age, race and gender data of victim and defendant in each homicide prosecution in the State of California since 1977, and all transcripts of all California penalty trials relating to "offenses committed on or after" 977.³

³Harris' motion for discovery requested the State to provide the following information:

1. The defendant's name, case number, and county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which any special circumstance was alleged, and which resulted in at least one conviction of murder in the first or second degree or manslaughter.
2. The defendant's name, case number, and county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which no special circumstance was alleged, but which resulted in (1) a conviction for murder in the first or second degree or manslaughter, and (2) a conviction for any felony enumerated in Penal Code Section 190.1(a)(17) — robbery, kidnapping, rape, sodomy, child molesting, oral copulation, burglary, arson, or train wrecking.
3. The defendant's name, case number, county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which no special circumstance was alleged, but which resulted in at least one conviction for first degree murder and at least one other conviction for at least second degree murder.
4. For each case listed in the response to (1) above, the age, race and gender of each defendant, and the age, race, and gender of each decedent.
5. For each case listed in the response to (2) above, the age, race and gender of each defendant; and the age, race, and gender of each decedent.



To be entitled to an evidentiary hearing, Harris must demonstrate that (1) "he has alleged facts which, if proved, would entitle him to relief, and (2) an evidentiary hearing is required to establish the truth of his allegations." *Harris I*, 692 F.2d at 1197 (citing *Pierce*, 572 F.2d at 1340-41); *Townsend v. Sain*, 372 U.S. 293, 312 (1963). The district court did not grant Harris' motion for discovery or request for an evidentiary hearing because it held that, even assuming the truth of Harris' factual statistical allegations, his discrimination claims failed.

20] An evidentiary hearing would be necessary to hear any evidence that a *particular* defendant was discriminated against because of his race, age, or gender. But as we discuss in the next section of this opinion, general statistical studies of the kind offered here do not prove discrimination. Moreover, it is not necessary to conduct a full evidentiary hearing as to studies which do nothing more than show an unexplainable disparity.

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6. For each case listed in the response to (3) above, the age, race and gender of each defendant; and the age, race and gender of each decedent.
 7. Petitioner requests that respondent make available for inspection and copying the computer tape computed by the California Department of Justice, Bureau of Criminal Statistics, containing information about all homicides in California occurring on or after August 11, 1977.
 8. Petitioner requests that respondent make available for inspection and copying the transcripts of all California penalty trials relating to offenses committed on or after August 11, 1977.

Petitioner further requests permission to obtain an expert to be appointed by the Court to analyze and report on the data described above, and to present the results of this analysis and report in support of an evidentiary hearing to establish the substance of petitioner's arbitrariness and discrimination claims.

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C. *Applicability of McCleskey v. Kemp*

Last term, the Supreme Court in *McCleskey v. Kemp*, 481 U.S. —, 107 S. Ct. 1756 (1987), considered the use of statistical studies to prove discriminatory treatment. Because Harris' discrimination claims are quite similar to the defendant's contentions in *McCleskey*, we discuss the Supreme Court's decision in some detail.

In *McCleskey*, the defendant contended the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the eighth and fourteenth amendments to the United States Constitution. *Id.* at 1763. In support of his claim, the defendant proffered a statistical study that purported to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The statistical study examined over 2,000 murder cases which occurred in Georgia during the 1970s. The raw data indicated that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The studies also examined the relationship between the race of the defendant and the victim.

The data was subjected to an "extensive analysis" taking into account 230 variables that could have explained the disparities on nonracial grounds. *Id.* at 1764. One of the models concluded that "even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks." *Id.*

In analyzing the defendants eighth and fourteenth amendment challenges, the Court "assume[d] the study is valid statistically without reviewing the factual findings of the District Court." *Id.* at 1766 n.7. The assumption that the studies were valid did not include the assumption that the studies showed



that racial considerations actually entered into any sentencing decisions in Georgia, but only demonstrated a "risk that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision." *Id.* (emphasis in original).

1. Proof of Purposeful Discrimination

The Court reiterated that "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination'," *id.* at 1766 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)) (footnote omitted), and that "the purposeful discrimination 'had a discriminatory effect' on him," 107 S. Ct. at 1766 (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). Thus, the Court held, "to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." 107 S. Ct. at 1766 (emphasis in original). McCleskey had offered no evidence that would support an inference that racial consideration played a part in *his* sentence, but instead relied on statistical studies, arguing the studies compelled an inference that his sentence rests on purposeful discrimination. *Id.* at 1767. McCleskey had argued that the statistics were "sufficient proof of discrimination, without regard to the facts of a particular case . . ." *Id.*

The Court noted that it had accepted statistics as proof of intent in certain limited contexts, e.g., equal protection violation in selection of the jury venire in a particular district and in the form of multiple regression analysis to prove statutory violations under Title VII, *id.* at 1767, but "the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case." *Id.* 1767-68. The important differences between the cases in which the Court has accepted statistics as proof of discriminatory intent is that, in the venire-selection and Title VII contexts, (1) "the

statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions," and (2) "the decisionmaker has an opportunity to explain the statistical disparity." *Id.* at 1768 (footnotes omitted). Because implementing criminal laws against murder necessarily involves discretionary judgment, the Court stated that it "would demand exceptionally clear proof before we would infer that the discretion has been abused." *Id.* at 1769. The Court held:

The unique nature of the decisions at issue in this case also counsel against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.

Id.

In the matter before us, Harris proffered a statistical study performed by James Cole which purports to show a disparity in the imposition of the death sentence in California based on the race of the murder victim. Both murder victims in this case were white. Harris is also white. The Cole study is actually two statistical studies that examine 238 cases which resulted in the penalty of death involving intentional homicides and robbery homicides in California from 1978 to 1982. The raw numbers analyzed by Cole indicated that murders involving white victims accounted for 76.5% of all death sentences for intentional homicides in California. By contrast, only 38.7% of the intentional homicides committed at that time involved white victims. Cole concluded that someone whose victim was white had a five times greater possibility of receiving the death penalty than someone whose victim was nonwhite.

In the second study involving robbery homicides, Cole indicated that crimes involving white victims accounted for

73% of all death sentences in California. By contrast, only 46.5% of the robbery homicides committed involved white victims. Cole concluded that someone committing robbery murder on a white victim had approximately three times the possibility of ultimately receiving the death sentence as someone committing the crime on a nonwhite victim.

As to the gender discrimination claim, Harris submitted declarations showing that in California between 1978 and 1982, 2,179 persons were convicted of murder, of which only approximately 94, or 4.3%, were female. Of the 144 persons sentenced to death during that period, none were female. Harris' expert witness concluded the total exclusion of women from the pool of those defendants receiving the death sentence is indicative of gender influencing the sentencing process.

As to the age discrimination claim, Harris submitted affidavits by Dr. Cole showing that in California between 1981 and 1982, the number of persons in the 25 to 29 and 30 to 34 year age groups were disproportionately higher than those defendants receiving the death sentence. Dr. Cole relied on the following comparisons:

Age Group	Death Sentence Recipients in Age Group	Persons Arrested for Murder in Age Group
20-24	20.2%	33.4%
25-29	35.1	25.4
30-34	31.1	16.4
35-39	6.8	9.1
40+	6.8	15.7
Total	100.0%	100.0%

[21] Harris' statistical proffer of evidence, even assuming the truth of his allegations, does not entitle him to an evidentiary hearing or discovery on his equal protection claim. Harris has not demonstrated that the decisionmakers in his case acted with discriminatory purpose on the basis of the race of



his two victims, his gender or age. Harris' statistical evidence does not provide "exceptionally clear proof" that the jury in his case abused its discretion in recommending the sentence of death. In *McCleskey*, the defendant's study revealed that someone charged with killing a white victim was 4.3 times as likely to receive a death sentence as a defendant charged with killing a black victim. Harris' study only reveals a marginally higher ratio, i.e., five times as likely.

As to Harris' gender discrimination claim, Harris' statistics show that while 94 women, or 4.3%, were convicted of murder during this time period, none of the 144 persons sentenced to death during this period were female. These statistics fail to demonstrate if any of the 94 women (1) committed crimes which permitted their execution, or (2) were eligible for the death sentence.⁶ "Other than the mere fact that there are no women on death row, there is nothing to support the claim that women are not there because of discrimination." *Richmond v. Ricketts*, 640 F. Supp. 767, 802 (D. Az. 1986). These statistical flaws are fatal to Harris' claim. Not only did his statistics not entitle him to discovery or an evidentiary hearing on this claim, but they do not present the "exceptionally clear proof" required to demonstrate purposeful discrimination.

Harris' age discrimination claim likewise suffers from an inadequate showing. The statistical differences are legally insufficient to support his age discrimination claim. Accordingly, we hold that the Cole study is clearly insufficient to support an inference that any of the decisionmakers in Harris' case acted with discriminatory purpose. Harris was not entitled to an evidentiary hearing or discovery.

⁶In California, the legislature has limited the imposition of the death penalty to a small subclass of homicides. A defendant is only eligible for the death penalty if the jury finds (1) the defendant guilty of first degree murder, Cal. Penal Code §§ 190.1(a), (b), 190 (1977), and (2) at least one "special circumstance" which the prosecution charged to be true, *id.* at § 190.2(a)-(c).

2. Eighth Amendment Claim

[22] Harris next contends that the California capital sentencing system is arbitrary and capricious in *application* in violation of the eighth amendment prohibition against cruel and unusual punishment because racial, age and gender considerations may influence capital sentencing decisions in California. The Supreme Court rejected a similar claim in *McCleskey*, 107 S. Ct. at 1775.

The Court noted that the Baldus study, similar to but more complex than the Cole study before us, did not *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. *Id.* The Court explained that "[s]tatistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials." *Id.* The inquiry becomes "'at what point [does] that risk become constitutionally unacceptable.'" *Id.* (quoting *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986)). The Supreme Court in *McCleskey* held that the Baldus study did not demonstrate the "constitutional measure of an unacceptable risk" of racial prejudice. 107 S. Ct. at 1775.

The Court reasoned that "a capital sentencing jury representative of a criminal defendant's community assures a 'diffused impartiality' " in the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death.' " *Id.* at 1776 (citations omitted) (footnote omitted). Acknowledging that the Baldus study at most indicates "a discrepancy that appears to correlate with race," *id.* at 1777, the Court stated that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system" because "any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse.'" *Id.* at 1777-78 (citations omitted) (footnote omitted). The Court then held:

The Court has consistently held that the government has a duty to protect its citizens from harm. In *United States v. Gaudin*, 341 U.S. 488 (1953), the Court held that the government is responsible for the safety of its citizens. The Court stated that the government has a duty to protect its citizens from harm, and that this duty is not limited to the physical safety of its citizens, but also extends to their mental and emotional well-being. The Court held that the government has a duty to protect its citizens from harm, and that this duty is not limited to the physical safety of its citizens, but also extends to their mental and emotional well-being.

The Court further stated that the government has a duty to protect its citizens from harm, and that this duty is not limited to the physical safety of its citizens, but also extends to their mental and emotional well-being. The Court held that the government has a duty to protect its citizens from harm, and that this duty is not limited to the physical safety of its citizens, but also extends to their mental and emotional well-being. The Court stated that the government has a duty to protect its citizens from harm, and that this duty is not limited to the physical safety of its citizens, but also extends to their mental and emotional well-being.

Despite these imperfections, our consistent rule has been that *constitutional guarantees are met when "the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible."* Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process. . . . [¶] The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.

Id. at 1778, 1781 (emphasis added) (citation omitted) (footnote omitted). With these principles of law in mind, we analyze Harris' eighth amendment claim.

The Cole study does not prove that the factors of race, gender or age entered into any capital sentencing decision in California or that these elements were factors in Harris' particular case. At most, the Cole study demonstrates a discrepancy that may correlate with the race of Harris' victims, Harris' gender and age. California's capital sentencing system does not contain the systemic arbitrariness and capriciousness in the imposition of capital punishment found in statutory schemes invalidated by *Furman v. Georgia*, 408 U.S. 238 (1972). In *Pulley v. Harris*, the Supreme Court examined California's capital sentencing statute.⁷ The Court held that "this

⁷The Supreme Court explained, in detail, California's 1977 capital sentencing statute:

1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It mentions the various committees and the work they have done, and also the progress of the various departments. It also mentions the various reports and the work they have done.

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system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged

Under this scheme, a person convicted of first-degree murder is sentenced to life imprisonment unless one or more "special circumstances" are found, in which case the punishment is either death or life imprisonment without parole. Cal. Penal Code Ann. §§ 190, 190.2 (West Supp. 1978). Special circumstances are alleged in the charging paper and tried with the issue of guilt at the initial phase of the trial. At the close of evidence, the jury decides guilt or innocence and determines whether the special circumstances alleged are present. Each special circumstance must be proved beyond a reasonable doubt. § 190.4(a). If the jury finds the defendant guilty of first-degree murder and finds at least one special circumstance, the trial proceeds to a second phase to determine the appropriate penalty. Additional evidence may be offered and the jury is given a list of relevant factors. § 190.3. "After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole." *Ibid.* If the jury returns a verdict of death, the defendant is deemed to move to modify the verdict. § 190.4(e). The trial judge then reviews the evidence and, in light of the statutory factors, makes an "independent determination as to whether the weight of the evidence supports the jury's findings and verdicts." *Ibid.* The judge is required to state on the record the reasons for his findings. *Ibid.* If the trial judge denies the motion for modification, there is an automatic appeal. §§ 190.4(e), 1239(b). The statute does not require comparative proportionality review or otherwise describe the nature of the appeal. It does state that the trial judge's refusal to modify the sentence "shall be reviewed." § 190.4(e). This would seem to include review of the evidence relied on by the judge. As the California Supreme Court has said, "the statutory requirements that the jury specify the special circumstances which permit imposition of the death penalty, and that the trial judge specify his reasons for denying modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case." *People v. Frierson*, 25 Cal. 3d, at 179, 599 P.2d at 609. That court has reduced a death sentence to life imprisonment because the evidence did not support the findings of special circumstances. *People v. Thompson*, 27 Cal. 3d 303, 611 P.2d 883 (1980).

under *Furman* and our subsequent cases." 465 U.S. at 53. Thus, we hold that the Cole study does not demonstrate a constitutionally significant risk of racial, gender or age bias affecting the California capital sentencing process.

VI. FAILURE TO GIVE PROPER INSTRUCTION ON AGE DISCRIMINATION

[23] Harris also contends that the death sentence was arbitrarily imposed as a result of the "uniquely ambiguous" provisions of California's capital sentencing statute, Cal. Penal Code § 190.3(h) (1977), because the statute permits arbitrary consideration of a defendant's age as an aggravating factor. Harris argues that section 190.3(h) is discriminatory and arbitrary because it permits age to be considered by the jury in balancing the aggravating and mitigating factors without labeling it either as aggravating or mitigating. The State argues that we should not consider this issue because Harris did not present this claim of instructional error in either his first or second federal petition nor was this issue exhausted on direct appeal or in post-conviction proceedings in the California court system.

A state prisoner who seeks relief under 28 U.S.C. § 2254 must provide the state courts a fair opportunity to correct any

By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small subclass of capital-eligible cases. The statutory list of relevant factors, applied to defendants within this subclass, "provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty," 692 F.2d, at 1194, "guarantee[ing] that the jury's discretion will be guided and its consideration deliberate," *id.*, at 1195. The jury's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S., at 189. Its decision is reviewed by the trial judge and the State Supreme Court.

Pulley v. Harris, 465 U.S. at 51-53 (footnotes omitted).

THE UNITED STATES OF AMERICA
DO hereby certify that
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Very Respectfully,
[illegible signature]

federal constitutional error committed in the trial court. *Picard v. Connor*, 404 U.S. 270, 275-276 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982)(per curiam). Thus, "the habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim." *Anderson*, 459 U.S. at 6. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Id.* (citations omitted). The Supreme Court recently stated:

Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose, 455 U.S. at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)).

1. *Federal Habeas Corpus Petitions.*

[24] Harris claims that the issue of instructional error concerning age discrimination was "clearly raised in the first federal habeas corpus petition, and the only new aspect of the claim is the empirical support for it which has become apparent from the accumulated experience of capital sentencing in California." The record does not support this assertion.

In Harris' Appellant's Opening Brief filed in this court, he contended he "was rendered unable to pursue his separate argument that, apart from endemic age discrimination, California's unique and open-end specification of age as a penalty factor permits particular juries to arbitrarily and capriciously

turn a defendant's age *against him* in the capital sentencing process." (Emphasis in original). Harris claims he was unable to pursue this "argument" because the district court did not permit an evidentiary hearing on this issue.

It does not appear from the record that Harris requested an evidentiary hearing on this issue. Thus, he did not properly preserve this issue for appeal to this court. Moreover, he was not entitled to an evidentiary hearing to present a purely *legal* argument. An evidentiary hearing is to present disputed facts.

The district court provided Harris an opportunity to brief the issues raised in his petition, including his age discrimination claim. In response, Harris presented arguments in support of his age discrimination claims under the eighth and fourteenth amendments, but did not argue that section 190.3(h) is arbitrary because age is not labeled either as an aggravating or mitigating factor. Harris admits he did not raise this precise issue in the district court.

We ordered Harris and the State to file supplemental briefs and to attach relevant exhibits to demonstrate wherein Harris raised this issue in his state and federal proceedings. In Harris' supplemental brief, he asserts that he raised this issue in both state and federal court. However, as we demonstrate below, this claim finds no support in the record.

2. *No Exhaustion In The State Court Proceedings.*

Harris claims he raised this issue on direct appeal to the California Supreme Court. Specifically, Harris points to arguments presented in his Appellant's Opening Brief before that court at pages 164, 166 and 167. In his Supplemental Brief, Harris states:

[A]ppellant raised the issue of 'the need for (1) objective, unambiguous standards to guide and to chan-



nel the sentencing authority's discretion' (Appellant's Opening Brief, p. 164 . . . [paragraph])

Specifically, appellant complained that although:

. . . section 190.3 directs that the jury take into account what is termed 'aggravating' and 'mitigating' circumstances, the jury is never advised which factors listed in the statute fall into one category or the other. (See CALJIC Nos. 8.88.1, 8.89.) . . .

This argument, however, is not the same contention Harris now raises on appeal. Furthermore, we addressed this question in *Harris I*. In *Harris I*, we stated:

Nor do we think that the statute's failure to label factors as aggravating or mitigating invalidates the statute. The Supreme Court has previously upheld the statute that did not explicitly identify factors as aggravating or mitigating but merely asked the jury to answer several particular questions. Because the California statute establishes factors to guide the jury's discretion and allows for consideration of the particular aggravating and mitigating circumstances in this case, the statute is not unconstitutional in this respect.

692 F.2d at 1194 (citation omitted).

Harris next contends he raised the instructional error issue in state post-conviction proceedings. Specifically referring to Section I of his state habeas corpus petition at page 3, Harris argues:

the pertinent portions of the petition set forth the claims that appellant's age was used as an aggravating factor by the jury in violation of the Eighth and Fourteenth Amendments. Appellant alleged that the

The first of these is the fact that the defendant's conduct was not in accordance with the requirements of the law. The second is the fact that the defendant's conduct was not in accordance with the requirements of the law.

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statute 'failed to limit and direct sentencing discretion'.

The issue actually presented in his state habeas corpus petition reads as follows:

PETITIONER'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE CALIFORNIA DEATH PENALTY PROVISIONS FAIL TO LIMIT AND DIRECT SENTENCING DISCRETION AND FAILED TO AFFORD MEANINGFUL APPELLATE REVIEW, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The argument that the statute is unconstitutional because it fails to limit and direct the sentencing discretion is not the same contention on appeal before us, namely that there was instructional error as to age as an arbitrary factor. The issue in fact presented to the state court was rejected in *Harris I*.

VII. NONSTATUTORY PENALTY PHASE JURY INSTRUCTION

[25] Under California's 1977 capital sentencing statute, a jury is given an instruction in the penalty phase of the trial which contains ten aggravating and mitigating factors it shall "consider, take into account and be guided by" in deciding whether to impose death or life imprisonment prison without the possibility of parole.⁸ Cal. Penal Code § 190.3(a)-(j)

⁸Section 190.3 provides the following factors:

In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to § 190.1.

(1977). The statute does not identify or describe these factors as aggravating or mitigating. *Pulley v. Harris*, 465 U.S. at 52 n.14. The trial court in this case modified the standard instruction, California Jury Instructions, Criminal No. 8.88.1, containing these factors, and admonished the jury to consider the defendant's "character, background, history, mental condition and physical condition."

[26] On appeal, Harris contends the use of these nonstatutory factors violated his federal constitutional rights to due process and the prohibition against cruel and unusual punishment. He argues that these factors (1) do not genuinely nar-

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

1. The first of these is the fact that the human body is a complex system of organs and tissues, each of which has its own function to perform. The body is a unity, and the organs and tissues are interdependent. The body is a system, and the organs and tissues are parts of the system.
2. The second of these is the fact that the human body is a dynamic system. The organs and tissues are constantly changing, and the body is constantly adapting to its environment. The body is a system, and the organs and tissues are parts of the system.
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5. The fifth of these is the fact that the human body is a system of control. The organs and tissues are constantly receiving control signals, and the body is constantly responding to control signals. The body is a system, and the organs and tissues are parts of the system.
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7. The seventh of these is the fact that the human body is a system of reproduction. The organs and tissues are constantly reproducing, and the body is constantly producing offspring. The body is a system, and the organs and tissues are parts of the system.
8. The eighth of these is the fact that the human body is a system of death. The organs and tissues are constantly dying, and the body is constantly dying. The body is a system, and the organs and tissues are parts of the system.
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row the class of persons eligible for the death penalty, and (2) do not reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. He asserts further that these factors should actually militate in favor of a lesser penalty. He also contends that these factors are so unconstitutionally broad and vague in their meaning and limitless in their application that they do not provide a sentencing standard capable of promoting a consistent and rational application of the death penalty. The State asks that we decline to review this issue under Rule 9(b).

A. *Insufficient Showing of Abuse of the Writ*

The State argued before the district court that the alleged instructional error should not be adjudicated because Harris abused the writ under Rule 9(b). The district court reached the merits of Harris' claim, and thus impliedly rejected the State's Rule 9(b) argument. On appeal, the State claims Rule 9(b) provides "an independently sufficient reason to affirm the District Court's rejection of this claim."

The State contends Harris abused the writ under Rule 9(b) because he did not raise this issue in his first petition. The State asserts that Harris' excuse for not presenting this claim in his first federal petition — "the claim was not raised in petitioner's previous section 2254 petition due to neglect or ineffectiveness of petitioner's previous appointed appellate counsel [Michael McCabe]" — is not sufficient to permit the district court to consider the merits of the claim. Harris' counsel responds that he did not withhold the claim for any tactical reason, but merely "because he missed it."

The determination whether to deny a hearing or dismiss a petition is reviewed for abuse of discretion. *Sanders*, 373 U.S. at 18.

In *Richmond*, we recently addressed the procedure that is applicable where a state prisoner raises new claims in a sec-

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ond petition under section 2254. 774 F.2d at 960-61. We explained the appropriate three-part standard to apply in determining whether there is an abuse of the writ under Rule 9(b):

Previously unadjudicated claims must be decided on the merits unless [1] the petitioner has made a conscious decision deliberately to withhold them, [2] is pursuing "needless piecemeal litigation," or [3] has raised the claims only to "vex, harass, or delay."

Id. at 961 (citations omitted).

[27] There is no affirmative indication in the record, and the State does not claim, that Harris' counsel made a conscious decision deliberately to withhold this contention, to proceed by piecemeal litigation, to vex or harass the court or State, or to delay the proceedings. Thus, Harris' second federal petition did not constitute an abuse on this claim.

B. *Validity of the District Court's Determination of the Merits Of Harris' Claim*

We begin our analysis of Harris' contentions concerning the alleged instructional error looking to applicable California statutes for guidance concerning the evidence the jury can consider in selecting the proper punishment in a capital case. The introductory paragraph of section 190.3 explains the wide range of evidence that is admissible during the penalty phase:

... In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, ... the defendant's character, background, history, mental condition and physical condition.

(Emphasis added). Thus, "[t]he admission of evidence is not limited to matters relevant to the specified aggravating or mitigating factors."⁹ *People v. Murtishaw*, 29 Cal. 3d 733, 773, 631 P.2d 446, 470, 175 Cal. Rptr. 738, 762 (1981) (footnote omitted), *cert. denied*, 455 U.S. 922 (1982); *see also Barclay v. Florida*, 463 U.S. 939, 967 (1983) (Stevens, J., concurring in judgment) ("the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime") (citing cases). "[T]he jury [i]s free, after considering the listed aggravating and mitigating factors, to consider any other matter it thought relevant to the penalty determination." *Boyd*, 38 Cal. 3d at 773, 700 P.2d at 790, 215 Cal. Rptr. at 9. Thus, psychiatric evidence is admissible to show defendant's present "character, background, history, mental condition and physical condition." *Murtishaw*, 29 Cal. 3d at 774 n.39, 631 P.2d at 470 n.39, 175 Cal. Rptr. at 762 n.39.

Harris argues that the court's modified instruction permitted the use of mental or physical condition as an aggravating factor "so as to arbitrarily weigh a sentencing decision in favor of death." The court's modified instruction cannot be reasonably so construed.

During the guilt phase of the trial, Harris testified that he had nothing to do with the murders. During the penalty phase, Harris recanted that testimony, and expressly admitted the crimes and stated he was "sorry." He sought to sup-

⁹As we noted in footnote 1, the case before us arises under California's 1977 capital sentencing statute. In interpreting a different version of § 190.3 under the 1978 statute, the California Supreme Court held the jury can only consider evidence relevant to the specific factors enumerated in § 190.3. *People v. Boyd*, 38 Cal. 3d 762, 773-75, 700 P.2d 782, 790-92, 215 Cal. Rptr. 1, 9-11 (1985).

port his claim of remorse by calling Deputy Sheriff Mendoza who testified that when he inquired into Harris' emotional state after he cut his arm in an alleged suicide attempt, Harris appeared to feel remorse for his crimes.

Harris points to the testimony of Dr. Wait Griswold, a psychiatrist who had examined Harris in the early morning hours of July 6, 1978, to demonstrate that the nonstatutory factors of mental and physical condition were used by the prosecution as aggravating circumstances. Dr. Griswold was called by the prosecution to testify in rebuttal to Harris' claim of remorse. The psychiatrist testified that he was of the opinion that Harris had a personality disorder known as an "antisocial personality" in psychiatric nomenclature.

Antisocial personality is listed as No. 301.70 in *DSM-II: Diagnostic and Statistical Manual of Mental Disorder* (3d ed. 1980) (hereinafter *DSM III*). This disorder is also known as a "psychopathic" or "sociopathic" personality. This personality disorder is not a neurosis or a psychosis. An individual is not born with this personality disorder; rather, it is a product of the individual's background, upbringing, and environment.

Dr. Griswold testified that an antisocial individual tends to be immature, emotionally unstable, callous, irresponsible, manipulative, impulsive, egotistical, has an inability to profit from past experience or punishment, projects the blame on someone else, and does not feel true remorse for crimes he commits. He stated this type of individual would be able to have the capacity to appreciate the criminality of his actions, the ability to control his actions, and to deliberate and premeditate upon a murder.

The factors the jury was asked to consider concerning the defendant's "character, background, mental condition, and physical condition" were stated neutrally. They were not described as aggravating or mitigating. The jury heard that

The latter the jury was told to consider as evidence of the defendant's "physical condition" and as evidence of his "physical condition" was stated to be "the fact that he was described as appearing as ailing. The jury heard the

Harris had a dismal childhood, and the evidence showed that his father had severely beaten Harris when he was an infant. There was also evidence about his minimal education, the conviction of his father for sexually molesting his sister, and his mother's conviction for bank robbery. Under the court's instruction all of the foregoing evidence could be considered in mitigation of the punishment Harris should suffer for his crimes. The Supreme Court has often repeated the principle that "[w]hat is important at the selection [of punishment] stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983)(emphasis in original)(citing cases). Evidence of a defendant's character, background, history, mental condition and physical condition permit such a determination. The court's instruction impartially informed the jury that it was proper to consider such evidence in selecting the appropriate punishment.

Citing to language in *Zant v. Stephens*, 462 U.S. at 885, Harris claims the "trial court permitted appellant's sentencing jury to find as aggravating factors which '... actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness.'" The Supreme Court in *Stephens* cited *Miller v. Florida*, 373 So.2d 882 (Fla. 1979) for this proposition.

In *Miller*, after the defendant had been charged with murder, he was found incompetent to stand trial and committed to the state mental hospital. After two and one-half years of confinement and treatment, he was found sufficiently competent to stand trial; his mental illness was in remission through the use of tranquilizing drugs. Testimony was presented at the sentencing hearing that the defendant was suffering from paranoid schizophrenia and hallucinations. He had been committed to mental hospitals on several previous occasions.

The trial judge, during the penalty phase, concluded that "the mental sickness or illness that [defendant] suffers from is



such that he will never recover from it, it will only be repressed by the use of drugs." *Id.* at 885. Relying principally on this factor, the judge sentenced defendant to death because this was the "only assurance society can receive that this man never again commits to another human being what he did to that lady" *Id.*

Miller is clearly distinguishable from the circumstances presented in the instant matter. The primary reason that the Florida Supreme Court reversed the sentence of death is that the trial judge relied on a *nonstatutory* aggravating factor. Under Florida law, a trial judge is not permitted to consider a nonstatutory circumstance in selecting the proper penalty. Furthermore, the evidence concerning Harris' "mental condition" is distinguishable from the evidence of psychosis (paranoid schizophrenia) relied upon by the trial judge in *Miller*. Dr. Griswold testified Harris had a personality disorder, i.e., antisocial personality, DSM III 301.70, and expressly distinguished this type of mental disorder from a psychosis or neurosis. A personality disorder is not analagous to "the incurable and dangerous mental illness" of a person diagnosed as suffering from paranoid schizophrenia and hallucinations.

The jury is entitled to consider the character of the defendant during the penalty phase to make an individualized determination of the sentence. *Stephens*, 462 U.S. at 879. The defendant properly introduced evidence at the penalty phase that he felt remorse notwithstanding his earlier testimony that he did not commit the homicides. The prosecution was also entitled to rebut this belated recantation and acceptance of responsibility by introducing evidence about Harris' background and personality to his attempt to mitigate his homicidal conduct. "[T]he presence or absence of remorse is a factor relevant to the jury's penalty decision" in a capital case. *People v. Ghent*, 43 Cal. 3d 739, 771, 739 P.2d 1250, 1271, 239 Cal. Rptr. 82, 103 (1987). The instruction permitting the jury to consider the defendant's "character, background, his-

that the jury is not to be bound by the verdict of the jury. It is the duty of the jury to return a verdict in accordance with the law and the facts as presented to them. The jury is not to be bound by the verdict of the jury. It is the duty of the jury to return a verdict in accordance with the law and the facts as presented to them.

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The first of these is the fact that the
 country is a very fertile one, and
 the soil is very rich. The second
 is that the climate is very healthy,
 and the air is very pure. The third
 is that the water is very soft, and
 the food is very good.

The water is the only one of the kind
 in the world, and it is very good.

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84-4XF8003
10/03/89

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT ALTON HARRIS,
Petitioner,

v.

R. PULLEY, Warden OF THE
CALIFORNIA STATE PRISON AT SAN
QUENTIN, CALIFORNIA,
Respondent.

No. 84-6433

D.C. Nos.
CR 82-0249-E and
CR 82-1005-E

**ORDER
AMENDING
OPINION**

Filed September 28, 1989

Before: Arthur L. Alarcon, Melvin Brunetti and
John T. Noonan, Jr., Circuit Judges.

ORDER

The opinion in this matter filed July 8, 1988, is amended as follows:

1. Slip. op. at 8394. In the second full paragraph change "(hereinafter *DSM III*)" to "(hereinafter *DSM II*)."

2. Slip. op. at 8396. In the first full paragraph, change "*DSM III*" to "*DSM II*."

3. Slip op. at 8396. Add the following text at the end of the first full paragraph:

DSM-II, which Dr. Griswold relied on during his testimony, lists specified "mental disorders." These disorders include such conditions as anxiety neuro-



sis or "anxious over-concern;" [DSM-II § 300.00] obsessive compulsive neurosis or the persistent intrusion of unwanted thoughts, urges, or actions that the patient is unable to stop;" [DSM-II § 300.3] neurasthenic neurosis, "characterized by complaints of chronic weakness, easy fatigability and sometimes exhaustion;" [DSM-II § 300.5] and a variety of other neuroses such as "writer's cramp." All of these neuroses disturb mental functioning and those suffering the problem are aware that their functioning is disturbed.

In distinction from these neuroses are a group of personality disorders "characterized by deeply ingrained maladaptive patterns of behavior." *DSM-II* § 301. These disorders include an obsessive compulsive personality, otherwise known as anankastic personality, a condition characterized "by excessive concern with conformity and adherence to standards of conscience." *Id.* § 301.4. There is also an "asthenic personality," distinguished from the related neuroses by being a behavior pattern marked by "easy fatigability, low energy level, lack of enthusiasm, marked incapacity for enjoyment, and oversensitivity to physical and emotional stress." *Id.* § 301.6. The diagnostic category "antisocial personality" is one of these personality disorders. *Id.* § 301.7.

It is a question of first impression whether all or any conditions classified as mental disorders by the American Psychiatric Association must be recognized by a state as a mitigating factor in imposing capital punishment. They are from one point of view "can't helps" — characteristics of an individual that no single act of volition on the individual's part would change. From another point of view, they are characteristics which to the ordinary lay person are



part of an individual's personality or character, and any judgment about personality or character would take them into account.

Considering the specified and unspecified neuroses and the specified types of personality disorders, one is aware that the diagnostic categories of the American Psychiatric Association fit a number of persons who function in American society without treatment and who form part of the general society. An estimate of the prevalence of antisocial personality disorder, made in 1980 after the trial in this case, was that about three percent of American males suffered from it. *DSM-III*, p. 319.

The DSM is prepared by the American Psychiatric Association primarily to identify conditions which members of the Association may diagnose. To a considerable degree, these psychiatrists have determined mental disorders by the morals and conventions of our society. Most dramatically, in *DSM-II*, under the general category of "Personality Disorders and Certain Other Non-Psychiatric Disorders," there was a subcategory "Sexual Deviations," a classification "for individuals whose sexual interests are directed primarily towards objects other than people of the opposite sex . . ." *DSM-II* n.302 (1968). This general definition of sexual deviation as a mental disorder was in conflict with the definition that followed of homosexuality, which was accepted as not in itself a psychiatric disorder and treated as a psychiatric disorder only for those who wished to change their sexual orientation. In *DSM-III* (1980) the general definition of sexual deviation was abandoned and a new definition as supplied of homosexuality as a mental disorder. Only "egodystonic homosexuality," defined as "a desire to acquire heterosexual arousal . . . and a sus-



tained pattern of overt sexual arousal that the individual explicitly states has been unwanted," was treated as a mental disorder. *DSM-III*, P.281. The amendment was clearly a result of changing morals and conventions in the United States.

This interaction between general social attitudes and what seems appropriate for medical diagnosis is suggestive that what is classified as a mental disorder by the American Psychiatric Association is not necessarily a condition that a state is constitutionally required to take into account in assessing punishment. In the case of the condition described as an antisocial personality there is a substantial tension between the implications of its being seen as a "can't help" characteristic and what are the frequent accompaniments of this condition. The disorder, the American Psychiatric Association observes, often leads to "many years of institutionalization, more commonly penal than medical." *DSM-III*, p.318. In adulthood those with this condition are marked by a "failure to accept social norms with respect to lawful behavior." *Id.*

Zant suggested that "mental illness" might actually militate in favor of a penalty less than death. The "mental disorder" of such antisocial personality is not "mental illness" in the sense used by *Zant*. For the ordinary citizen it would, to say the least, be paradoxical that a person who was likely not to accept social norms with respect to lawful behavior should be treated more kindly than the person who was law-abiding. The paradox is all the stronger when it is the view of the American Psychiatric Association that persons with this condition are capable of understanding the consequences of their actions and are willing to perform or not to perform particular volitional acts. We may go further and say that it is diffi-

cult to suppose that there are any persons who commit the kind of vicious crime for which the death penalty is now imposed in this country who do not possess one or more of the personality disorders or one or more of the neuroses recognized as mental disorders by the American Psychiatric Association. To hold that each of these conditions must be a mitigating factor when the death penalty is considered would be to undermine the death penalty under the guise of acknowledging that what the American Psychiatric Association finds to be a mental disorder must be treated as a factor that calls for less severe punishment than death. We cannot say that the evolving standards of decency that have characterized interpretation of the eighth amendment require a state to conform its scheme of capital punishment to such a norm.

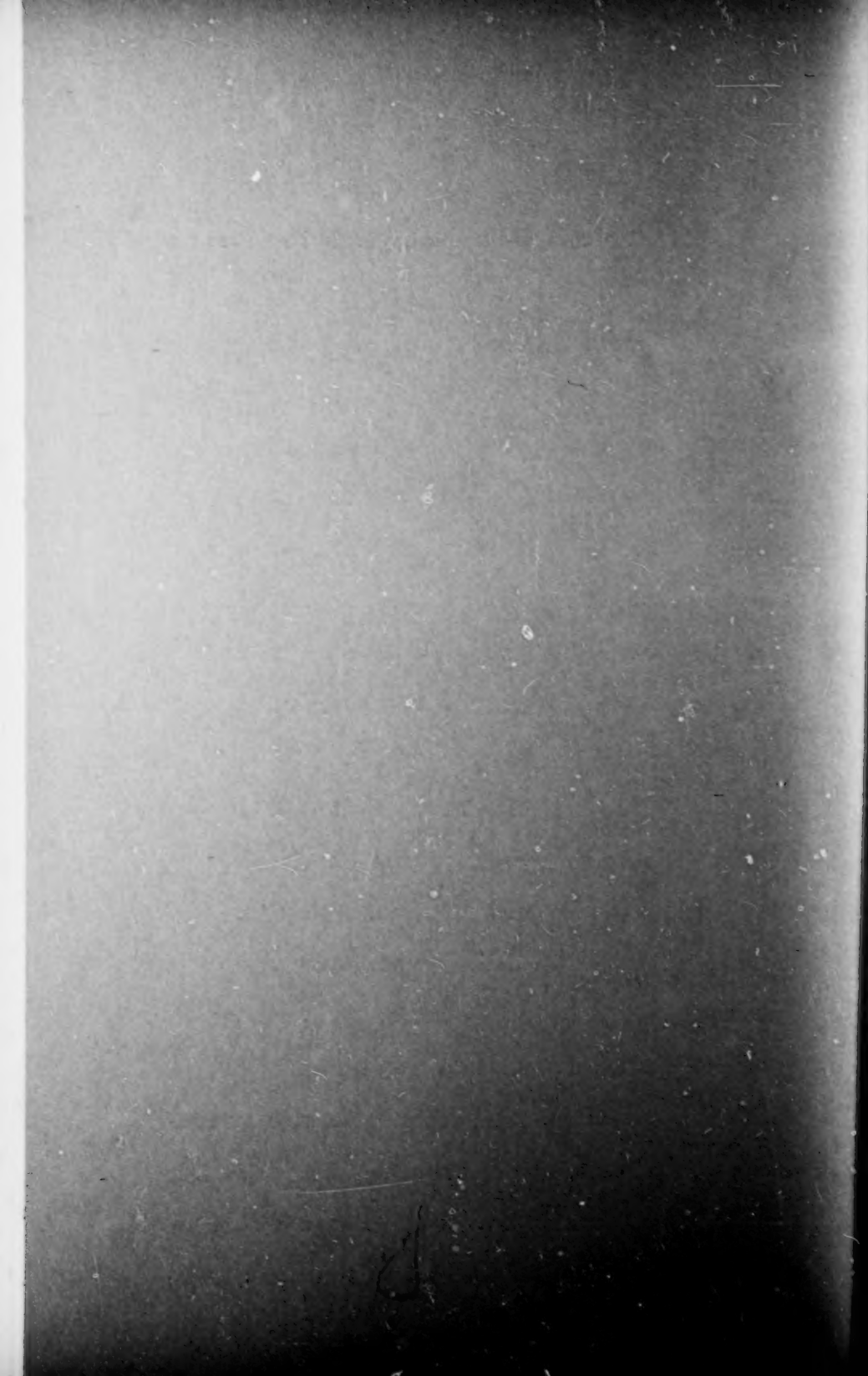
With these amendments, the panel has voted unanimously to deny the petition for a rehearing and to reject the suggestion for a rehearing en banc.

A judge in regular active service requested a vote to determine whether to rehear this matter en banc. A majority of judges in regular active service voted against a rehearing en banc.

The mandate shall issue forthwith.

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PENAL CODE, § 190.3

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved



the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and was acquitted. The restriction on the use of this evidence is intended to apply only to proceedings conducted pursuant to this section and is not intended to affect

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statutory or decisional law allowing such evidence to be used in other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time, as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances

found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or

defendant acted under extreme duress or

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under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it not a legal excuse for the crime.

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be

- 6. -

guided by the aggravating and mitigating
circumstances referred to in this section,
and shall determine whether the penalty
shall be death or life imprisonment
without the possibility of parole.

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

No: 89-767
October Term, 1989

JOHN K. VAN DE KAMP
Attorney General of
the State of California

ROBERT ALTON HARRIS

Petitioner,

LOUIS R. HANOIAN

Supervising Deputy Attorney General

v.

110 West A Street, Suite 700
San Diego, California 92101

R. PULLY, WARDEN, CALIFORNIA
STATE PRISON AT SAN QUENTIN
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have caused service of the within RESPONDENT'S BRIEF IN OPPOSITION as follows:

To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named below as follows: each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 13th day of December, 1989.

Charles M. Sevilla
Cleary & Sevilla
Michael J. McCabe
Attorneys for Petitioner, Robert A. Harris
1010 Second Avenue, Suite 1601
San Diego, CA 92101-4906

There is a delivery service by United States Mail and/or courier service at each place so addressed or regular communication by United States Mail and/or courier service between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, December 13, 1989.

Subscribed and sworn to before me
this 13th day of December, 1989.

John M. Burns
Notary Public in and for said County and State

Lidia Villarreal
LIDIA VILLARREAL

